LAW REFORM

ORDER OF APPLICATION OF ASSETS IN SATISFACTION OF DEBTS AND LIABILITIES

Report for Discussion No. 19

September 2001

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Correction – Report for Discussion #19

The page numbers referred to in the second paragraph of page v are incorrect, the sentence should end... pages 46 to 48 of the report. We apologize for any inconvenience

ALBERTA LAW REFORM INSTITUTE

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ORDER OF APPLICATION OF ASSETS IN SATISFACTION OF DEBTS AND LIABILITIES

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ALBERTA LAW REFORM INSTITUTE

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The Institute acknowledges with gratitude the work of Janice Henderson-Lypkie, the Counsel who has had carriage of this project. Ms. Henderson-Lypkie commenced the work as part of the Succession Law project when she was a full time counsel at the Institute, and has completed the work on a contract basis after her return to practice.

The topic requires a thorough knowledge of a very technical area of law, along with an historical understanding of the origin and development of the rules over a number of centuries. The report demonstrates not only Ms. Henderson-Lypkie's understanding and analysis of the law, but also her ability to explain its operation, shortcomings, and avenues for improvement in clear and informative terms.

As usual, and sincerely, we record the contribution of Board members to the development of the policy and its exposition. In particular, we should mention the contribution of Anne de Villars, Q.C., a member of the ALRI Board, and Karen Platten, former Chair of the Wills and Estates Northern Section of the CBA, Alberta Branch.

PREFACE AND INVITATION TO COMMENT

The Report also sets out two issues dealing with the impact of non-consensual security interests, and the impact of tax consequences triggered by the death of the testator.

We invite your comment on both of these issues which are described at pages 35 to 37 of the report. You may provide your comments by:

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PART I — EXECUTIVE SUMMARY

The value of assets in most estates exceeds the testator's debts and the funeral and testamentary expenses and, therefore, the personal representative has sufficient means to pay these obligations in full. There will, however, be cases in which the size of the estate, while sufficient to pay these obligations, is not sufficient to pay these obligations as well as the gifts made in the will. Over the course of hundreds of years, the English courts developed an order in which assets of an estate can be resorted to for payment of debts and funeral and testamentary expenses. This order does not affect creditors, per se, who can attach any asset they want. It does not dictate the assets the personal representative can use to pay these obligations. But this order does determine how beneficiaries are ultimately affected by payment of these obligations. By the general principles of marshalling, if an asset from a higher class is used to pay debts and funeral and testamentary expenses, the beneficiary of such an asset can look to assets in the lower classes and receive the monetary value of the asset used to pay these obligations. The rules are very technical in nature, and many modern English texts no longer discuss these rules because they have been supplanted in England by statutory order. Alberta has no such statutory order and, therefore, the rules developed in the case law still apply.

PAYMENT OF UNSECURED DEBTS

Widdifield on Executors' Accounts, 5th ed., lists the order in which the assets of the estate can be resorted to for the payment of unsecured debts, as follows:

1. The general personal estate not bequeathed at all, or by way of residue only.
2. Real estate devised in trust to pay debts.
3. Real estate descended to the heir and not charged with payment of debts.
4. Real or personal estate charged with the payment of debts, and (as to realty) devised specifically or by way of residue, or suffered, by reason of lapsed devise, to descend; or (as to personalty) specifically bequeathed, subject to that charge.
5. General pecuniary legacies, including annuities and demonstrative legacies that have become general.
6. Specific legacies (including demonstrative legacies that so remain), specific devises and residuary devises not charged with debts, to contribute pro rata.

7. Real and personal estate over which the testator had a general power of appointment which has been expressly exercised by deed (in favour of volunteers) or by will.
8. Paraphernalia of the testator's widow.

Similar statements are found in other sources, although class 8 is not usually included in the other sources. The content of class 4 is uncertain on two accounts. First, it is uncertain whether a specific legacy that is charged with payment of debts forms part of this class. Second, it is uncertain when a direction to pay debts will be interpreted as impliedly charging real property (or personal property) with payment of debts. This order does not apply where the testator expresses a contrary intention in the will.

This archaic area of the law is badly in need of revision for the following reasons. First, the historical reasons for the development of the rules are no longer relevant with the result that the distinctions made in the rules are no longer justifiable. For example, how does one justify the fact that if the testator devises realty on trust for payment of debts, the debts must still be paid first from the personal property that passes by way of residue? Second, determining what the rules are involves reading case law developed over a 225 period. This alone speaks of the need for a clear and simplified statutory order. Third, as one would expect, a body of case law developed over this length of time is full of contradictory decisions. In this area, the more one reads, the more confused one becomes. Fourth, the law is uncertain. What falls into class 4? What exactly is the effect of a direction to pay debts?

For the purpose of marshalling, we recommend that the order in which assets are applied in payment of unsecured debts and liabilities should be as follows:

(a) property specifically charged with the payment of debts or left on trust for the payment of debts;
(b) property passing by way of intestacy and property passing by way of residue;
(c) general gifts of property;
(d) specific gifts of property;
(e) property over which the deceased had a general power of appointment that has been expressly exercised by will.

Each class will include both personal property and real property, and no distinction should be made between the two types of property within a given class. Each asset within a given class would contribute rateably to payment of debts. To charge property with payment of debts or create a trust for payment of debts, a testator must do something more than give a general direction that debts be paid or impose a trust that the testator's debts be paid. This proposed statutory order could be varied by an expression of contrary intention by the testator.

Keep in mind that the proposed marshalling rules would not affect a creditor's right to enforce payment of the debt against any asset in the estate. Also, these rules will not determine which assets the personal representative actually uses to pay creditors because the personal representative remains entitled to satisfy creditors out of the first available moneys. The proposed marshalling rules only deal with the ultimate adjustments among the various beneficiaries after payment of debts and funeral and testamentary expenses.

PAYMENT OF SECURED DEBTS

At one time payment of secured debts was treated in the same manner as payment of unsecured debts. The devisee of mortgaged land could look to the general personal estate for payment of the debt secured by the mortgage. In the last half of the 19th century this was changed in England with the introduction of three statutes known collectively as *Locke King's Acts*. Section 40 of the *Administration of Estates Act* derives from the *Locke King's Acts*. This section provides that when a person dies possessed of an interest in property that is charged with the payment of money by way of mortgage, the interest so charged is, as between the different persons claiming through the deceased, liable primarily for payment of the charge. This general rule is subject to the contrary intention of the testator. In result, land that is charged by a mortgage is primarily liable for the payment of the mortgage debt. This section does not, however, cover agreements for sale of land and it is not clear whether the section applies to personal property security interests.

We recommend that section 40 of the *Administration of Estates Act* be expanded to include agreements for sale of land and security interests prescribed by the *Personal Property Security Act*. We seek comment on the following issue:

should property that is subject to a non-consensual security interest be primarily responsible for payment of the obligation secured by the non-consensual security interest? A non-consensual security interest is an interest in the property of the debtor that secures payment of performance of an obligation that arises by reason of common law and statutory liens, rights of distress, statutory charges, deemed trusts and statutory trusts.

INCOME TAX TRIGGERED BY DEATH OF TESTATOR

Another recurring problem arises by reason of income tax triggered by the death of the testator. The problem most frequently arises by reason of registered retirement savings plans ('RRSP'), but can also arise upon the deemed sale of land or shares or other property on the death of the testator. Several lawyers have suggested to us that the assets in the RRSP should be primarily responsible for the income tax triggered by it because this is what most testators want to happen. They point to unhappy situations in which a testator wished to benefit two children equally, by giving one the RRSP and the other cash of equal value. The income tax triggered by the deemed position of the RRSP is paid from the cash, leaving one child with substantially more, and the other with substantially less, than the testator intended. This is a matter easily dealt with at the will planning stage. The problem arises, therefore, most often in wills drafted by lay persons.

The issue is whether the majority of testators would want a specific asset that triggers income tax to be primarily responsible for payment of the income tax arising from that asset, or whether the existing default position reflects the expectation of the majority of testators. For example, do most testators want the RRSP to bear the burden of the income tax triggered by the RRSP, or do they want the residuary assets to be used to pay the resulting income taxes? What is the expectation in respect of other assets that trigger income tax on the death of the testator? Before making a recommendation on this point we must hear from lawyers who practice in this area. This input will allow us to better evaluate whether assets that trigger income tax by reason of the deemed disposition of that asset on death should be primarily responsible for payment of that portion of the income tax.

PART II — LIST OF RECOMMENDATIONS

RECOMMENDATION No. 1
For the purpose of marshalling, the order in which assets are applied in payment of unsecured debts and liabilities should be as follows:
(a) property specifically charged with the payment of debts or left on trust for the payment of debts;
(b) property passing by way of intestacy and property passing by way of residue;
(c) general gifts of property;
(d) specific gifts of property;
(e) property over which the deceased had a general power of appointment that has been expressly exercised by will. 45

RECOMMENDATION No. 2
Each class should include both personal property and real property, and no distinction should be made between the two types of property within a given class. 45

RECOMMENDATION No. 3
Each asset within a given class should contribute rateably to payment of debts. 45

RECOMMENDATION No. 4
To charge property with payment of debts or create a trust for payment of debts, a testator must do something more than:
(a) give a general direction that debts be paid,
(b) give a general direction that the executor pay the testator's debts, or
(c) impose a trust that the testator's debts be paid. 46

RECOMMENDATION No. 5
The statutory order of application of assets may be varied by the will of the deceased. 46

RECOMMENDATION No. 6
Section 40 of the *Administration of Estates Act* should be expanded to include agreements for sale of land and security interests prescribed by the *Personal Property Security Act*. 47

REQUEST FOR COMMENT: Non-consensual security interests
Should property that is subject to a non-consensual security interest be primarily responsible for payment of the obligation secured by the non-consensual security interest? 47

REQUEST FOR COMMENT: Income Tax
Should an asset that triggers income tax by reason of the death of the testator be primarily responsible for payment of the income tax arising from that asset? . . 48

PART III — REPORT

CHAPTER 1. INTRODUCTION

A. Introduction

The value of assets in most estates exceeds the testator's debts and the funeral and testamentary expenses and, therefore, the personal representative has sufficient means to pay these obligations in full. There will, however, be cases in which the size of the estate, while sufficient to pay these obligations, is not sufficient to pay these obligations as well as the gifts made in the will. Over the course of hundreds of years, the English courts developed an order in which assets of an estate can be resorted to for payment of debts and funeral and testamentary expenses. This order does not affect creditors, per se, who can attach any asset they want.[1] It does not dictate the assets the personal representative can use to pay these obligations. But this order does determine how beneficiaries are ultimately affected by payment of these obligations. By the general principle of marshalling, if an asset from a higher class is used to pay debts and funeral and testamentary expenses, the beneficiary of such an asset can look to assets in the lower classes and receive the monetary value of the asset used to pay these obligations. The rules are very technical in nature, and many modern English texts no longer discuss these rules because they have been supplanted by statutory order.[2] Alberta has no such statutory order and, therefore, the rules developed in the case law still apply.

In this report, we will discuss the order of application of assets and the historical reasons for the development of this order. We will then show how this order came to be applied in Canada and how in most provinces it remains unchanged by legislation. Special attention is given to the Alberta cases decided in this area and to the current Alberta practice.

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[1] *Manning* v. *Spooner* (1796), 3 Ves. June 115, 30 E.R. 923.

[2] See *Administration of Estates Act, 1925* (U.K.), ss 33 and 34 and First Schedule-Part II. For a discussion of the application of marshalling principles to beneficiaries, see *Snell's Principles of Equity*, 19th ed. (London: Sweet & Maxwell, 1925) at 282-84.

B. Terminology

Since the rules of marshalling are of such a technical nature, it is useful to review the terminology that defines this area. The key terms are as follows:

bequeath: To give personal property by will to another.[3]

bequest: A gift by will of personal property; a legacy.[4]

devise: (noun) A testamentary disposition of land or realty. It does not include a testamentary gift of personal property.[5]

devise: (verb) To give real property by will to another.

devisee: The person to whom lands or other real property are devised or given by will.[6]

legacy: A disposition of personalty by will.[7]

legatee: The person to whom a legacy is given.[8]

general legacy[9]: A pecuniary legacy payable out of the general assets of a testator. One so given as not to amount to a bequest of a particular thing or particular

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[3] Black's Law Dictionary, 4th ed. at 202.

[4] *Ibid.*

[5] *Ibid.* at 539.

[6] *Ibid.* at 539.

[7] *Ibid.* at 1037.

[8] *Ibid.* at 1043.

[9] For a detailed discussion on the difference between general, specific and demonstrative legacies see Woodman, *Administration of Assets*, 2d ed. (Sydney: Law Book Company, 1978) at 67-71 (with useful examples), W.A. Lee, *The Administration of Solvent Estates in Queensland* (St. Lucia: University of Queensland Press, 1973) at 12-3, Halsbury's Laws of England, Vol. 14 (London: Butterworths, 1910) at 261, para. 603-4, and Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (1991) at 184. Hereafter, Ontario Law Reform Commission will be abbreviated as OLRC.

money of the testator, distinguished from others of the same kind. One of quantity merely, not specific.[10]

specific legacy: "A specific legacy must be of something forming part of the testator's estate; it must be a part as distinguished from the whole of his personal property or from the whole of the general residue of his personal estate; it must be identified by a sufficient description, and separated in favour of the particular legatee from the general mass of the testator's personal estate."[11] A specific legacy will adeem if the specific asset has been sold by the testator or is no longer in existence at the time death, with the result that the legatee gets nothing.[12] The doctrine of ademption has caused courts to lean strongly against specific legacies and to prefer to treat legacies as either demonstrative or general.[13]

demonstrative legacy: A pecuniary legacy payable out of a particular fund.[14] To be construed as a demonstrative legacy the will must disclose two criteria: (1) that recourse for payment of the legacy is first to the fund; and (2) that there is no expressed intention of the testator precluding satisfaction of the legacy out of some other property of the testator, if the particular fund proves inadequate.[15] "To the extent that fund referred to in a demonstrative legacy is sufficient, the legacy ranks as a specific legacy. However, to the extent that the fund is not sufficient, the legacy ranks as a general legacy."[16]

pecuniary legacy: A bequest of a sum of money, or an annuity. It may or may not specify the fund from which it is drawn.[17]

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[10] Black's Law Dictionary, 4th ed. at 1038.

[11] Halsbury's Laws of England, Vol. 14, *supra* note 9 at 261, para. 603.

[12] Lee, *supra* note 9 at 12.

[13] Woodman, *supra* note 9 at 19.

[14] Halsbury's Laws of England, Vol. 14, *supra* note 9 at 261, para. 604.

[15] *Culbertson* v. *Culbertson* (1967), 60 W.W.R. 187 (Sask. C.A.).

[16] OLRC, *Report on Administration of Estates of Deceased Persons*, *supra* note 9 at 184.

[17] Black's Law Dictionary, 4th ed. at 1038.

The terminology in this area is very technical and made more difficult by the fact that several terms are used interchangeably by various sources. For example, personalty, personal estate and personal property all have the same meaning in this area. Such is also the case for realty, real estate and real property, as well as bequest and legacy. In this report, all of these terms will be used by authorities quoted in the report. Where possible, however, we use the terms personal property and real property and legacy.

CHAPTER 2. THE ORDER OF APPLICATION OF ASSETS FOR THE PAYMENT OF DEBTS

A. In payment of unsecured debts

1. The order as established by English case law for payment of unsecured debts

Widdifield on Executors' Accounts, 5th ed.,[18] lists the order in which the assets of the estate can be resorted to for the payment of unsecured debts, as follows:[19]

1. The general personal estate not bequeathed at all, or by way of residue only.
2. Real estate devised in trust to pay debts.
3. Real estate descended to the heir[20] and not charged with payment of debts.
4. Real or personal estate charged with the payment of debts, and (as to realty) devised specifically or by way of residue, or suffered, by reason of lapsed devise, to descend; or (as to personalty) specifically bequeathed, subject to that charge.
5. General pecuniary legacies, including annuities and demonstrative legacies that have become general.
6. Specific legacies (including demonstrative legacies that so remain), specific devises and residuary devises not charged with debts, to contribute pro rata.
7. Real and personal estate over which the testator had a general power of appointment which has been expressly exercised by deed (in favour of volunteers) or by will.
8. Paraphernalia of the testator's widow.

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[18] F.D. Baker, *Widdifield on Executors' Accounts*, 5th ed. (Toronto: Carswell, 1967). Hereafter this authority is referred to as 'Widdifield'.

[19] *Ibid.* at 87-86.

[20] This class refers to land that passes by way of intestacy. The class is expressed in this fashion because the rules were developed during the time when land that did not pass by will descended to the heir by right of primogeniture and personal property that did not pass by will went to the next of kin.

Similar statements are found in other sources,[21] although class 8 is not usually included in the other sources.[22] Class 1 is sometimes described as "the general personalty[23] less the retention thereout of a fund sufficient to meet any pecuniary legacies".[24] In this context, general personalty is all personalty that is not the subject of a specific bequest and includes: (1) personalty not bequeathed at all, (2) personalty bequeathed by way of residue, and (3) general pecuniary legacies.[25] Another term used interchangeably with "general personalty" is "general personal estate". In this report, we will use the term general personal estate.

2. Historical development of order of application of assets

The order is really a summary of the rules of marshalling developed by the English courts over a 225 year period commencing in the early 1700s and ending in 1925.[26]

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[21] See: (1) Theobald, *A Concise Treatise on the Law of Wills*, 7th ed. (London: Stevens and Sons, 1907) at 828-32,
(2) Halsbury's Laws of England, Vol. 14, *supra* note 9 at 285-288, 291-293,
(3) *Snell's Principles of Equity*, 19th ed. (London: Sweet & Maxwell, 1925) at 249-53,
(4) Queensland Law Reform Commission, *A Report on the Law Relating to Succession* (Report No. 22, 1978), at 38-39. Hereafter, Queensland Law Reform Commission will be abbreviated as QLRC.
(5) Woodman, *supra* note 9, Chapter 2.
(6) Law Reform Commission of Western Australia, Report on the Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies (Project No. 34-Part VII, 1988) at 12-17, but this source describes class 8 as "property the subject of a *donatio mortis causa* by the testator". However, later in the report the Commission notes that the existence of such a class is uncertain. *In re Korvine's Trust*, [1921] 1 Ch. 343 supports the existence of such a class. Hereafter Law Reform Commission of Western Australia will be abbreviated as LRCWA.
(7) OLRC, *Report on the Administration of Estates of Deceased Persons*, *supra* note 9 at 184-85.

[22] Halsbury's Laws of England, Vol. 14, *supra*, note 9 at 293, fn. (f) indicates that the widow's paraphernalia might formerly have been resorted to after all her husband's property was exhausted; but articles that were formerly designated paraphernalia now belong absolutely to the wife. At 219, para. 493, the term *bona paraphernalia* is defined as "apparel or ornaments given by a husband to a wife, suitable to her rank or station in life, for the purpose of being worn by the wife, and not as an absolute gift to her."

[23] Another term used to describe "general personalty" is "general personal estate".

[24] Woodman, *supra* 9 at 13.

[25] Woodman, *supra* note 9 at 17. This author also notes that it included personalty subject to a general power of appointment that passed under a residuary gift by virtue of s. 27 of the *Wills Act*, 1837 (U.K.), 15 & 16 Vict., c. 24.

[26] See authorities cited in support of order in Halsbury's Laws of England, Vol. 14, *supra*, note 9 at

(continued...)

The development was affected by the law that existed during that time. In England, prior to the enactment of *The Land Transfer Act, 1897* (U.K.), personal property of the deceased vested in the personal representative of the deceased and real property vested in the heir at law or devisee.[27] Under the rules of the common law courts, creditors had to look to payment from the personal representative because, except for certain specialty creditors,[28] land was not available for the payment of creditors. The courts of equity, however, took the view that all creditors should be paid and it helped ordinary creditors in two ways. Woodman summarises the approach of the courts of equity as follows:[29]

> The intervention of the Court of Chancery in certain circumstances alleviated the unfortunate position of the ordinary creditors. First, the Court of Chancery gave effect to directions by a testator when he devised realty to trustees upon trust for payment of his debts, or when he devised realty charged with the payment of his debts, and readily inferred an intention that debts were to be paid out of land; for example, a general direction for payment of debts was considered sufficient to charge realty with the payment of debts. . . Secondly, even if realty was not devised upon trust for the payment of debts or charged with such payment, the Court of Chancery invoked the doctrine of marshalling in aid of ordinary creditors; it has already been noted that specialty creditors had recourse, at common law, to realty, and the Court compelled the specialty creditors to resort to the realty in the first instance, so that, if the specialty creditors exhausted or diminished the personalty, the ordinary creditors were subrogated to the rights of the specialty creditors against the realty. But the general personalty was still, in equity, the primary fund for the payment of ordinary creditors, and this could only be overcome by an express or implied direction, that realty should be the primary fund.

The fact that the general personal estate, less the retention of a fund sufficient to meet pecuniary legacies, is primarily liable for payment of debts stems from the common law rule that personal property was originally the only type of asset

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[26] (...continued)
291-293.

[27] Woodman, *supra*, note 9 at 13-16 and G. Miller, *The Machinery of Succession*, 2d ed. (Aldershot: Dartmouth, 1996) at 98-99.

[28] A specialty debt is a debt due by deed or instrument under seal. Freehold estates in fee simple which descended to the heir or devisee were liable for payment of specialty debts if the contract giving rise to the specialty debt bound the heir or devisee for payment of the debt. The specialty creditor had to sue the heir or devisee who was liable to the value of the land. See Woodman, *ibid.* at 8 and 14 and *Irwin* v. *Ironmonger* (1831), 2 Russ. & M. 531.

[29] Woodman, *ibid.* at 14-15.

available for payment of debts and funeral and testamentary expenses.[30] It also explains why the courts of equity required not only that the realty be onerated with payment of debts but that the general personal estate be exonerated. This will be discussed in detail later in this report.

Since the marshalling rules were well established in England and Canada by the time that real property vested in the personal representative,[31] the courts did not vary the rules because of this change, notwithstanding that the historical reason for many of the rules disappeared.[32] In time this was made clear by legislation. For example, section 6 of the *Devolution of Estates Act*[33] reads as follows:

> 6(1) In the administration of assets of the deceased person his real property shall be administered in the same manner, subject to the same liabilities for debts, costs and expenses, and has the same incidents, as if it were personal property.
>
> (2) Nothing in this Act alters or affects the order in which real and personal assets respectively are applicable, as between different beneficiaries, in or toward the payment of funeral and testamentary expenses, debts or legacies, or the liability of real property to be charged with payment of legacies.

3. Comments on the individual classes of assets

a. Class 1: General personal estate not bequeathed at all, or by way of residue only

The personal property not specifically bequeathed less the retention of a fund sufficient to meet pecuniary legacies is primarily liable for payment of debts unless it is exonerated from this liability.[34] This class includes personal property that is

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[30] *Allan* v. *Gott* (1872) 7 L.R. Ch. App. 439 at 442 and Woodman, *ibid.* at 19.

[31] In Alberta, land has vested in the personal representative since January 1, 1887 with the coming into force of *The Territories Real Property Act*, S.C. 1886, c. 26, s. 5. This became the law in England in1897 with the introduction of the *Land Transfer Act*, 60 & 61 Vict., c. 65.

[32] See *Mercer* v. *Neff* (1899), 29 O.R. 680; *In Re Roberts*, [1902] 2 Ch 835; *In re Kempster*, [1906] 1 Ch 446; *Re McVicar* (1906), 6 Terr L.R. 363; *Re Moody Estate* (1906), 12 O.L.R. 10; *Re Steacy* (1917), 39 O.L.R. 548 (H.C.J.); *Alexander* v. *Royal Trust Company and Stipe*, 1949] 2 D.L.R. 824 (Alta. S.C.A.D.) per MacDonald J.A.; *Re Rigetti Estate*,[1950] 1 W.W.R. 529 (Sask. K.B.); *In re Kusy Estate, Jackim* v. *Kusy*, (1953), 9 W.W.R. (N.S.) 675 (Man. K.B.).

[33] R.S.A. 1980, c. D-34.

[34] For example, see *Manning* v. *Spooner*, *supra* note 1; *Barton* v. *Cooke* (1800), 5 Ves. June 461, 31 E.R. 1247; *Harmood* v. *Oglander* (1803), 8 Ves. June 106, 32 E.R. 293; *Re Hopkins* (1900), 32 O.R. 315 (Ont. H.C.J.); *In re Banks*, [1905] 1 Ch 547; *Re Moody Estate*, *supra* note 32; *Re McGarry* (1909), 18 O.L.R. 524 (Ont. D.C.); *Re Lord Strathcona's Estate*, [1918] 2 W.W.R. 499 (Man. C.A.);

(continued...)

not disposed of and personal property that passes by way of residue. If the will is such that there is both undisposed personal property and personal property that passes by residue, they contribute proportionately to the payment of debts and funeral and testamentary expenses.[35]

Under the common law order, real property that passes by way of residue does NOT fall into class 1. The reason for this is that all gifts of real estate are considered specific devises for the purposes of application of assets for payment of debts.[36] In 1886, Ontario enacted legislation which provided that real and personal property that passes by way of residue shall be applicable rateably to the payment of debts.[37] No such section has been introduced in Alberta, Saskatchewan[38] or Manitoba. The result is that Ontario case law that says that debts are payable out of the residue[39] is not applicable in Alberta. Nor do we think that *Re Randle*[40] says otherwise.

In *Re Randle*, the estate consisted of real property worth $18,040 and personal property worth $643,716. The testator made a specific devise and a specific bequest to his son George, gave $2,000 to his wife, and divided the

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[34] (...continued)
In re Youngberg Estate, [1922] 1 W.W.R. 79 (Alta. S.C.); *In re Brown Estate*, [1945] 3 W.W.R. 79 (Alta. S.C.); *In re Kusy Estate, Jackim* v. *Kusy*, *supra* note 32; *Re Randle* (1976), 71 D.L.R. (3d) 208 (Alta. C.A.); *Re Grisor* (1979) 101 D.L.R. (3d) 728 (Ont. H.C.J.) at 734-35.

[35] Woodman, *supra* note 9 at 19.

[36] *Jackson* v. *Pease* (1874), 19 L.R. Eq. 96; *Lancefield* v. *Iggulden* (1874), L.R. 10 Ch. App. 136; *Re Hopkins*, *supra* note 34; *Re Moody Estate*, *supra* note 32; *In re Kusy Estate, Jackim* v. *Kusy*, *supra* note 32.

[37] *Devolution of Estates Act*, S.O. 1886, c. 22, s. 7. This same section is now found in *Estates Administration Act*, R.S.O. 1990, c. E.22, s. 5, which reads as follows:

> 5. Subject to section 32 of the *Succession Law Reform Act*, the real and personal property of a deceased person comprised in a residuary devise or bequest, except so far as a contrary intention appears from the persons's will or any codicil thereto, is applicable rateably, according to their respective values, to the payment of his or her debts, funeral and testamentary expenses and the cost and expenses of administration.

[38] See *In re Rigetti Estate*, *supra* note 32.

[39] For example, see *Re Bennett*, [1955] O.W.N. 211 (Ont. H.C.J.) at 213 where court says:

> It is trite law that the debts and administration expenses are payable out of the residue of the estate and, so far as is possible in this estate, they should be paid from such residue.

[40] *Supra* note 34.

remainder among his other seven children. The residuary beneficiaries wanted their brother George, who received assets valued at $450,000, to contribute to payment of debts and other estate obligations. One of the issues addressed by the court was which part of the estate should be used to pay debts and testamentary expenses. On this point, the court stated:[41]

> Dealing with the debts and testamentary expenses counsel for the respondent George Randle submitted, and during argument, appellants' counsel conceded, the general rule to be that in the absence of anything contained in the will to express the testator's intention to the contrary the residue and more specifically residual personalty becomes the primary fund for payment of debts and testamentary expenses: *Manning* v. *Spooner* (1796), 3 Ves. Jun. 114, 30 E.R. 923; *Harwood* [sic] v. *Oglander* (1803), 8 Ves. Jun. 106, 32 E.R. 293; *Re Anstead, Gurney* v. *Anstead*, [1943]1 All E.R. 522; *Re Moody Estate* (1906), 12 O.L.R. 10; *Morrall* v. *Sutton* (1845),1 Ph. 533, and more recently *Re Bennett*, [1955] O.W.N. 211. The actual or de facto residue by plain and simple definition means that the estate assets left over and undisposed after all specific devises and legacies have been accounted for and in this case the left-over assets, consisting of personalty, are dealt with by the testator in subcl. (d). I would, therefore, dismiss the appeal from the part of the order directing that debts and testamentary expenses be paid out of the residue.

In this case, the residue was made up of household goods and furniture, cash on deposit, uncashed cheques, stocks, bonds and other securities, but did not include any real property.

Although this statement of principle is somewhat ambiguous, we believe that if the Court intended to overturn common-law principles of long standing it would have said so clearly. Furthermore, the bulk of authorities cited in the above quoted paragraph indicate that the class of assets that is primarily liable for payment of debts is the personal property that is not specifically bequeathed.[42] *Re Moody*, a case cited by the Alberta Court of Appeal in *Re Randle*, is authority that under the

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[41] *Re Randle*, *ibid.* at 212.

[42] See *Manning* v. *Spooner*, *supra* note 1; *Harmood* v. *Oglander*, *supra* note 34; *Re Moody Estate*, *supra* note 32. In *Re Moody Estate*, the testator gave all of his personal estate plus a farm to his son and devised the residue of his real estate to his executors upon certain trusts. After finding that section 7 of the *Devolution of Estates Act* did not apply, the court applied the common law order in which assets are applied for payment of debts. Under the common law order, personal property not specifically bequeathed is the primary fund for payment of debts. In this case, if all the personal property is consumed in payment of debts and some debts remain, then the court looks to real estate. Specific residuary devises and residuary devises of land are on the same footing in regard to liability to pay debts. Furthermore, the direction to pay debts charges all the testator's lands and, therefore, the land that is specifically devised and the land that passes by way of residue both contribute to payment of debts after personal property is depleted.

common law order, real property that passes by way of residue is not primarily liable for payment of debts and falls into the same category as specifically devised land.[43] The only two cases cited by the court that hold that the residue, including both real and personal property, is primarily liable for debts arise in two jurisdictions in which the common law order was altered by legislative amendment.[44] Finally, *Re Randle* is not a case in which real property formed part of the residue. In conclusion, since Alberta has not introduced legislation that alters the common law order in which assets are applied in payment of debts, and since there is no case that clearly changes the common law order, we believe that the common law order still applies in Alberta.

As will be discussed later in this report, it is possible for the testator to make something other than the general personal estate not bequeathed at all, or by way of residue only, primarily liable for payment of debts. Although this is true, the courts have shown a strong attachment to the common law order. As a result, the assets in class 1 remain primarily liable even when the testator devises real property in trust for payment of debts or charges real property with the payment of debts.[45] The presumption is that such statements make the real property an auxiliary fund that is to be resorted to only when the assets in class 1 have been exhausted.[46] The common law order has been criticized because in these situations it overrides the stated intention of the testator.[47]

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[43] *Re Moody*, *ibid.*

[44] See *Re Anstead*, [1943] 1 All E.R. 522 and *Re Bennett*, *supra* note 39. But *Re Anstead* may have been cited for its comments concerning the old order. At page 529, the court stated: "It is said, and rightly said, that under the method of administration current before the above Act came into force, the testamentary expenses would have been a first charge on the residuary personalty with the result that the pecuniary legacies would to a greater extent have been thrown on to the residuary real estate, and would have borne a larger share of the estate duty."

[45] Halsbury's Laws of England, Vol. 14, *supra* note 9 at 286, para. 664; *In re Banks*, *supra* note 34; *Re Lord Strathcona's Estate*, *supra* note 34.

[46] *Allan* v. *Gott*, *supra* note 30 at 442. This will be discussed in more detail later in the report.

[47] LRCWA, Project No. 34-Part VII, *supra* note 21 at 14.

b. Class 2: Real estate devised in trust for payment of debts

The second class consists of real property devised in trust to pay debts.[48] It is interesting to note that the second class does not make mention of personal property bequeathed in trust for payment of debts. This is explained by the fact that the law views personal property bequeathed in trust for payment of debt as an effective expression of intention that the general personal estate not bequeathed at all, or by way of residue only, is not primarily liable for payment of the debts.[49] Therefore, the common law order does not apply until such property is depleted in payment of debts.

c. Class 3: Real estate descended to the heir and not charged with payment of debts

The third class shows the special treatment given to land. Real property that passes by way of intestacy is only resorted to for payment of debts and funeral and testamentary expenses after the general personal estate not bequeathed at all, or by way of residue only, and any real property devised in trust for payment of debts have been exhausted.[50]

d. Class 4: Real or personal estate charged with payment of debts

Real property (and perhaps personal property) charged with payment of debts makes up the fourth class.[51] The content of class 4, however, is uncertain on two counts. First, it is uncertain whether a specific legacy that is charged with payment of debts forms part of this class. Second, it is uncertain when a direction to pay debts will be interpreted as impliedly charging real property (or personal property) with payment of debts.

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[48] *Manning* v. *Spooner*, *supra* note 1; *Harmood* v. *Oglander*, *supra* note 34; *Jaquette* v. *Jaquette* (1859), 27 Beav 332, 54 E.R. 130; *Alexander* v. *Royal Trust Co. and Snipe*, *supra* note 32.

[49] LRCWA, Report No. 34-Part VII, *supra* note 21 at 13 and *Re Smith*, [1913] 2 Ch 216 at 223.

[50] *Manning* v. *Spooner*, *supra* note 1; *Harmood* v. *Oglander*, *supra* note 34; *In re Rigetti Estate*, *supra* note 32.

[51] There are many cases dealing with Class 4 assets. The issue of whether real property is charged with payment of debts arises in a variety of contexts. But generally see *Aldrich* v. *Cooper* (1803), 8 Ves. 382 at 396; *Irvin* v. *Ironmonger*, *supra* note 28; *In re Roberts*, *supra* note 32; *Re Kempster*, *supra* note 32; *Re Moody Estate*, *supra* note 32; *Re Lockie* (1925), 28 O.W.N. 86; *Waldner Estate* v. *Salmon* (1987), 61 Sask. R. 59.

The first source of uncertainty is illustrated by the fact that some authorities include specific legacies that are charged with payment of debts in Class 4[52] and others do not.[53] The reason for the variation has been explained as follows:[54]

> First . . . if a testator charged a specified fund of personalty, other than residue, with the payment of debts, this was sufficient to discharge the general personalty from its primary liability. [authorities omitted] Personalty specifically bequeathed and charged with the payment of debts necessarily came within this rule, so that it was the primary fund for the payment of debts; this is inconsistent with a proposition that such property should come with the fourth class.
>
> Secondly, equity in its endeavours to make realty available for the payment of debts, readily inferred an intention that debts should be paid out of land, and considered that a general direction for payment of debts was sufficient to bring, within Class 4, all realty whether given specifically or by way of residue. . . and all personalty specifically bequeathed . . . [A] general direction for the payment of debts thus had the effect of charging specifically bequeathed personalty with the payment of debts so that, logically, the result should have been that such general directions made the personalty bequeathed primarily liable to satisfy debts, to the exoneration of the general personalty. This argument is, of course, contrary to authority. . . but is another explanation of the omission of specifically bequeathed personalty from Class 4 by the learned texts above mentioned.
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> The solution to the problem appears to be that, where there was a general direction to pay debts, specifically bequeathed personalty was charged with the payment of the debts to the extent of bringing such personalty into the fourth class, but not to the extent of making it primarily liable for payment of debts.

Some support for this solution is found in *Re Lord Strathcona's Estate*.[55] In that case, the Manitoba Court of Appeal considered the effect of a direction to pay the duties and legacies out of the general estate. The court held:[56]

> Although a direction for payment of duties and legacies out of 'general estate' (ninth clause and memorandum attached to will) might have the effect of charging them upon the real estate, as well as the personal property, that would not prevent the duties and legacies from being first payable out of personalty.

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[52] Widdifield, *supra* note 18 at 87-88; LRCWA, Report No 34-Part VII, *supra* note 21 at 12; and Woodman, *supra* note 9 at 20-21.

[53] Halsbury's Laws of England, Vol. 14, *supra* note 9 at 293; Snell, 19th ed., *supra* note 21 at 249.

[54] Woodman, *supra* note 9 at 20-21.

[55] *Supra* note 34.

[56] *Ibid.* at 508.

The second source of confusion stems from the fact that the courts usually, but do not always, interpret a direction to pay debts as impliedly charging real property with payment of debts. The cases either interpret such a direction as charging the real property with payment or debts, do not consider the effect of such a direction, or view it as an administrative direction only.[57] There is, however, a large body of case law in which the courts do interpret a direction to pay debts as impliedly charging real property with payment of debts.[58] This body of case law makes a distinction between a general direction that debts be paid and a direction that the executor pay the debts.[59] Although this is a very technical distinction, the English courts of the 1800s were reluctant to overrule it because it was so firmly entrenched.[60] Halsbury's Laws of England summarized the distinction as follows:[61]

> In the absence of an express charge of debts or legacies; a charge will be implied where there is a general direction by the testator that his debts or legacies, shall be paid, even though the only direction to be found is contained in the general introductory words of the will. Where, however, the direction to pay debts or legacies is coupled with a direction that they are to be paid by the executor, and there is no devise of real estate to him, no charge is to be implied.
>
> Where in addition to a direction to his executors to pay his debts or legacies the testator devises to them the whole of his real estate, a charge will be implied whether the executors take the whole beneficial interest, though in unequal shares, or only a life interest, or no beneficial interest at all. Where the direction to the executors to pay debts or legacies is accompanied by a devise of a portion only of the testator's realty, it is a question of intention to

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[57] LRCWA, Project 34- Part VII, *supra* note 21 at 16. See also *Re Steacy*, *supra* note 32.

[58] See Schedule A for a list of cases that deal with the effect of a general direction to pay debts and a direction that the executor pay the testator's debts.

[59] See Theobald on Wills, 7th ed., *supra* note 21 at 832-34; Snell, 19th ed., *supra* note 21 at 251-52; Halsbury's Laws of England, Vol. 14, *supra* note 9 at 237, para. 549. The leading case on this point in Australia is *Ramsay* v. *Lowther* (1912), 16 C.L.R. 1 (H.C. Aust.).

[60] *Cook* v. *Dawson* (1861), 29 Beav. 123, 54 E.R. 573 at 575. In that case, the court stated the law as follows:

> . . . where the testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally on the real estate, at least in all cases where the real estate is afterwards disposed of by will, which is the case here. But an exception obtains where the direction that the debts shall be paid is coupled with the direction that they are to be paid by the executor, as is the case here; in which case it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executor. . . . But this exception is again liable to another exception, namely, where the will contains a devise of land to the executors, there the direction that the debts are to be paid by the executors does not affect the validity of the general charge of debts.

[61] Vol. 14, *supra* note 9 at 237, para 549.

be gathered from the whole will whether the portion so devised is charged with payment of debts.[62]

The rationale for the distinction is that when the testator directs the executor to pay debts and then devises real property to the executor, he intends the executor to pay the debts out of the estate given to the executor.[63]

This distinction is born out by most, but not all, of the Canadian cases considering the issue.[64] Most of the cases considering the issue have arisen in Ontario. With the odd exception,[65] the earlier Ontario cases follow the English authorities.[66] However, later Ontario decisions have held that a direction to the executor to pay debts charges the real property with payment of debts even though there was no devise to the executors in the will. The few cases decided outside of Ontario follow the English authorities.[67]

Examples of cases that follow the English authority include *Re Moody Estate*[68] and *Eastern Trust Company* v. *Mills*.[69] In *Re Moody Estate*, the testator directed that debts and funeral and testamentary expenses be paid out of his estate. The court held that the effect of this general direction to pay debts is to charge payment of debts on the testator's land in aid of the personal estate, but not in relief

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[62] *In re Bailey* (1879), 12 Ch. 268, is an example of a situation in which the testator devised only a portion of his lands to the executor and the court concluded that by directing the executor to pay his debts, the testator did not intend to charge the real estate received by the executor for payment of debts.

[63] Halsbury's Laws of England, Vol. 14, *supra* note 9 at 237, fn. (f); *In re Brun* (1916), 36 O.L.R. 135 (Ont. S.C.A.D.); *Eastern Trust Company* v. *Mills* (1923), 56 N.S.R. 341 (N.S.C.A.).

[64] See Appendix A. Some of the better Canadian cases that discuss the English law and its application are: *In re Brun*, *ibid.* and *Eastern Trust Company* v. *Mills*, *ibid.* For a summary of Ontario decisions, see *Re Proudfoot Estate*, [1994] O.J. No. 704.

[65] *Re Steacy*, *supra* note 32.

[66] *Totten* v. *Totten* (1890), 20 O.R. 505 (H.C.); *Mercer* v. *Neff*, *supra* note 32; *Re Moody Estate*, *supra* note 32; *Re Le Brun*, *supra* note 63; *Reynolds* v. *Harrison* (1921), 66 D.L.R. 398 (Ont. H.C.).

[67] *Eastern Trust Company* v. *Mills*, *supra* note 63. Also see the obiter comments in *Grayson* v. *Walsh*, [1926] 1 W.W.R. 125 (Sask. K.B.) and *Re Lord Strathcona's Estate*, *supra* note 34 at 508. The obiter comments do not indicate any move away from the English position.

[68] *Supra* note 32.

[69] *Supra* note 63.

of the primary liability of the personal estate. Even though the testator devised a farm to the son and the residue of his real property to trustees upon certain trusts, all the real property had to contribute pro rata to the payment of debts remaining after exhaustion of general personal estate. In *Eastern Trust Company* v. *Mills*, the testator directed the executor to pay debts and funeral and testamentary expenses out of the estate. He then made specific devises of all his real property to various grandchildren. The court held that the real property was not charged with payment of debts and funeral and testamentary expenses because the real property was devised directly to various grandchildren and did not pass to the executor qua executor.

There are several cases, however, which do not follow the English line of authorities.[70] *Re Steacy*[71] is a case in which the testator directed that his debts and funeral and testamentary expenses be paid and then devised land to his son and bequeathed several pecuniary legacies. The issue was whether the land was charged with payment of debts and funeral and testamentary expenses. The court held that a general direction to pay debts does not always charge the land with payment of debts. Such a charge will only arise when there is a general direction to pay debts followed by a devise of all the real property to executors, either beneficially or on trust. "[A] mere pious wish that the law should be followed in paying of his debts, followed by a specific devise of lands to a particular devisee," does not manifest an intention on the testator's part to prefer the pecuniary legatees to devisee of lands.[72]

The court disapproved of the two English authorities, *In re Roberts*[73] and *Re Kempster*.[74] These two English cases held that a court should interpret a direction by a testator that all his debts and funeral and testamentary expenses be paid as creating a charge of debts upon the real property. *In re Kempster* also held that the

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[70] See *Re Steacy*, *supra* note 32; *Re McCutcheon and Smith*, [1933] O.W.N. 692 (C.A.); *Re Jefferies and Calder*, [1951] O.W.N. 27.

[71] *Ibid.*

[72] *Re Steacy*, *ibid.* at 552.

[73] *Supra* note 32.

[74] *Supra* note 32.

Land Transfer Act, 1897 (U.K.), which made real property vest in the personal representative, does not alter the construction of such clauses. *Re Steacy* is contrary to English authority and the result reached in *Re Moody Estate*.[75]

A few Canadian cases have also held that a direction to an executor to pay debts charges real property with payment of debts even though the testator made a devise of such real property to persons other than the executor.[76] These cases conflict with English authority and *Re Webb*[77] and *Eastern Trust Co.* v. *Mills*.[78]

Another line of cases considers the effect of a direction to pay debts, funeral and testamentary expenses, and succession duties. These cases establish that succession duties are not debts or testamentary expenses and a direction to pay debts and funeral and testamentary expenses does not affect succession duty. The cases differ as to what is the effect of a direction to pay succession duties. In some cases, such a direction has no effect; in other cases, it has been interpreted as making an additional gift to the legatees of the succession duty for which by statute the legatee is primarily liable.[79] The line of cases dealing with a direction to pay succession duties can be distinguished from cases dealing with a direction to pay debts because they deal with statutes that impose an inheritance tax on the legatees.

It is also possible for the court to imply that the real property passing by way of residue is charged with payment of debts by reason of a direction to pay debts.[80] For example, in *In re Bailey*[81] the testator directed by his will that "all my just debts, funeral and testamentary expenses may be paid by my executors hereinafter

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[75] *Supra* note 32.

[76] See *Re McCutcheon and Smith*, *supra* note 70 and *Re Jefferies and Calder*, *supra* note 70.

[77] (1932) 41 O.W.N. 77.

[78] *Supra* note 63.

[79] See "Drafting of Clauses Exonerating Beneficiaries from Payment of Taxes" (1941) 19 Can. B Rev. 598.

[80] *Re Bailey*, *supra* note 62; *Totten* v. *Totten*, *supra* note 66; *Re McCutcheon and Smith*, *supra* note 70.

[81] *Ibid.*

named as soon as conveniently may be after my decease." He then appointed his brother and his son John as executors. In his will, he gave all his household effects to his wife, devised parcels of land to each of his three sons and devised parcels of land to his executors and specified that certain lands were to be held in trust for each one of his three daughters. The residue of the estate, both real and personal, was given to the executors upon trust that it be sold and the income paid to the wife for her life and widowhood. If she remarried, the wife was to receive an annuity of 30 pounds.

The general personal estate was insufficient for payment of the testator's debts. The wife sought a declaration that the land held in trust for the daughters and the land devised to the son John, who was also the executor, were charged with payment of the testator's debts. The court held that in a situation in which there is a direction that the executors shall pay the testator's debts and some, but not all, of the real property vests in the executors, the court must determine from the whole of the will whether the testator intended to charge the real property held by the executor with payment of the debts. In this case the testator had intended to treat all of his children equally and, therefore, he did not intend to charge the lands that vested in the executor with payment of debts. Nevertheless, the real estate that passed by way of residue was charged with payment of debts by force of the word "residue" coupled with the direction to pay the debts.

A direction that the executor pay the testator's debts followed by a residuary devise is a common occurrence in wills. The effect of such wills is to charge the land that passes by way of residue with payment of debts. In such situations, the land that passes by way of residue will often be resorted to after class 1 assets are depleted in payment of debts because there will be no class 2 or class 3 assets in the estate.

e. Class 5: General pecuniary legacies, including annuities and demonstrative legacies that have become general

The fifth class is general pecuniary legacies.[82] Legacies must be paid out of the general personal estate unless the testator charges payment of legacies upon certain

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[82] *Barton* v. *Cook*, *supra* note 34 and cases cited in Halsbury's Laws of England, Vol. 14, *supra* note 9 at 292, fn. (p) and (q). In *Re McNeill Estate*, [1920] 1 W.W.R. 523, the Alberta Court of Appeal held that the general legacies must abate before the specific legacies.

property.[83] Legacies payable out of the general personal estate will fail if the debts exhaust the general personal estate.[84] To avoid this result, legatees argue whenever possible that the real property is expressly or impliedly charged with payment of debts and funeral and testamentary expenses. If they can establish that the real property is charged with payment of these obligations and that the creditors were satisfied out of the general personal estate, the rules of marshalling allow the legatees to stand in place of the creditors against the real property so far as the debts and funeral and testamentary expenses were paid out of the general personal estate.[85] This merely reflects the fact that the rules of marshalling are designed to prevent a person who has two funds for payment of his or her claim from coming upon one of them so as to disappoint another claimant who has that fund alone to resort to for payment.[86]

f. Class 6: Specific legacies, specific devises and residuary devises not charged with payment of debts

The English cases of the 1800s establish that class 6 consists of specific legacies, specific devises and real property that passes by way of residue.[87] The assets within

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[83] *Allan* v. *Gott* *supra* note 30; *Robertson* v. *Broadbent* (1883), 8 App. Cas. 812 at 815; *Re Craig* (1912), 3 D.L.R. 59 (Ont. H.C.J.); *Re Lord Strathcona's Estate*, *supra* note 34. Note that the finding in *Executors and Administrators Trust Company* v. *Mackenzie*, [1920] 3 W.W.R. 110 (Sask K.B.), is overcome by reason of *Devolution of Estates Act*, R.S.A. 1980, c. D-34, s. 6. See also CED Western, 3d ed. V. 35, "Wills", para. 458.

[84] For example, see *In re Brown Estate*, *supra* note 34.

[85] See for example, *Rickard* v. *Barrett* (1857), 3 K & J 289, 69 E.R. 1118; *Re Stokes* (1892), 67 L.T.R. 223; *In re Salt* (1895), 2 Ch. D. 203; *In re Roberts*, *supra* note 32; *In re Kempster*, *supra* note 32 and *Woodman*, *supra* note 9 at 104-105.

[86] *Re Steacy*, *supra* note 32 at 550. In this context, the creditors have the general personal estate and all of the other assets in the estate to look for payment. The legatees have only the general personal estate to resort to for payment. The rules of marshalling allow the legatees to marshall as against assets in lower classes. So, if there is real property charged with payment of debt (ie. class 4 assets), then the legatees (ie. class 5) are entitled to have the assets marshalled so as to stand in place of the creditors against the real estate so far as the debts and funeral and testamentary expenses have been paid out of the general personal estate.

[87] *Tombs* v. *Roch* (1846), 2 Coll. 490, 63 E.R. 823; *Fielding* v. *Preston* (1857), 1 De. G. & J. 438, 44 E.R. 793; *Raikes* v. *Boulton* (1860), 29 Beav 41, 54 E.R. 540; *Jackson* v. *Pease*, *supra* note 36; *Lancefield* v. *Iggulden*, *supra* note 36. For example, in *Jackson* v. *Pease* the court rejected the argument that the costs of law suit brought to enforce trusts relating to land should be borne by the devisees in exoneration of personal estate because the action related in the most part to issues pertaining to real estate. The court held that the residuary personal estate must be used to pay the costs of this action as far as it will go. Then specifically bequeathed personalty, specifically devised realty

(continued...)

this class must contribute rateably to the payment of any debts remaining owing after the exhaustion of all the other assets in the estate.[88] All of the authorities we have reviewed describe class 6 in this manner.[89]

The Canadian authorities of the 1900s have not uniformly followed the English cases. Some cases follow the English line of authorities, while others do not and hold that specific legacies must be exhausted before specific devises and real property that passes by way of residue. Unfortunately, there is often little discussion of earlier precedents and those cases that deviate from the established English law do not explain why they do so. There are five cases that follow the established English law. Of these, two cases hold that the law is as is established by the English cases, but on the facts of the case, there are no specific legacies.[90] In two other cases where there are specific bequests, the result conforms to the English authorities, but there is no discussion of the underlying principles.[91] The most recent case follows the English authorities by declaring that "residual bequests or unspecified personalty should be exhausted first for payment of debts, thereafter specific bequests of personalty and realty should be utilized on an equal basis pro rata".[92]

The decisions in *Eastern Trust Company* v. *Mills*[93] and *In re Meikle*[94] contradict the established English law by treating specific legacies differently than specific devises and real property that passes by way of residue. Although the first case may be distinguished, the second case refused to follow the English line of authority. In *Eastern Trust Company* v. *Mills*, the testator directed that his

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[87] (...continued)
and residuary devised realty must contribute rateably to make up any deficiency in cost of this action.

[88] *Ibid.*

[89] See authorities discussed in footnote 21.

[90] See *Re McGarry*, *supra* note 34; *Re Steacy*, *supra* note 32.

[91] In *Re Brown Estate*, *supra* note 32, where the balance of the estate was specifically disposed of, but it is unclear as to the nature of this property; *Re Watt*, [1958] O.W.N. 418 (Ont. H.C.J.).

[92] *Waugh Estate* v. *Waugh* (1990), 63 Man. R. (2d) 155 at para. 21.

[93] *Supra* note 63.

[94] [1943] 2 W.W.R. 156 (Alta. S.C.).

executors should "pay all my just debts, funeral and testamentary expenses out of my estate". He then gave certain specific legacies and specific devises to grandchildren and directed that " all my books, debts, insurance moneys and other assets not hereinbefore mentioned, shall be used for the payment of all my liabilities and mortgages." The assets designated for payment of debts were insufficient for this purpose and the question arose as to how the other estate assets were to be applied in the payment of debts.

The court held that the direction in the will that the executors pay the debts out of the estate must be understood as referring to the estate that passes to the executor to administer. In this case, the real property passed directly to the various devisees and did not pass to the executors qua executors. This being the case, the real property was not charged with payment of debts. The court then held that the executor must use the specific legacies mentioned in the will before resorting to real property for payment of debts and funeral and testamentary expenses. This result would conform to English authorities if the direction to the executor to pay debts created a charge on the specific legacies that passed to the executor, thereby making this class 4 property. However, the court concentrates on the effect of the direction in respect of real property, and not in respect of personal property, and therefore does not state whether the specific legacies are charged with payment of debts.

In re Meikle Estate[95] is a decision of the Alberta Supreme Court. The testator gave several specific legacies of bonds and shares to friends and devised a house and two lots to the Union Church. All the assets of the deceased were sold except for the land. After payment of debts and funeral and testamentary expenses, there was a balance of $1,890 to pay specific legacies worth over $2400. The legatees argued that the specific legacies and the specific devises must contribute proportionately to the payment of debts. The court rejected that argument, and instead adopted the statement made in *Re McVicar*[96] that "at common law the personal property of a deceased person was primarily chargeable with the payment of debts due by the deceased, funeral expenses and expenses of administration." It relied on a similar statement made in *Eastern Trust Co.* v. *Mills* and referred to *In*

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[95] *Ibid.*

[96] *Supra* note 32.

re Steacy. The court then held that the proceeds of all the bonds and shares were liable *pari passu* in priority to the land for the payment of debts and funeral and testamentary expenses.

It is respectfully submitted that this case is wrongly decided because it misconstrues the authorities it relies upon.[97] The case of *Re McVicar* does not purport to alter the established law and should be read in that context. The general summary given in *Re McVicar* is accurate for that case because the testator did not make a specific bequest. And it should be remembered that most of the earlier cases refer to "personal property not specifically bequeathed" instead of "personal property".[98] *Eastern Trust Co.* v. *Mills* can be distinguished as suggested above. The other authority mentioned is *In re Steacy*, which does not support the position taken *In re Meikle Estate*.

The better view of the law is that class 6 consists of specific legacies, specific devises, and real property that passes by way of residue.[99] Of course, class 6 assets can only exist if the testator has not expressly or impliedly charged any of these assets with payment of debts and funeral and testamentary expenses so as to bring them into class 4 or deviate from the order entirely.

g. Class 7: Real and personal estate over which the testator had a general power of appointment which has been expressly exercised by deed or by will

If all the testator's assets are depleted in the payment of debts and a deficiency still exists, real and personal property over which the testator had a general power of appointment which has been expressly exercised by deed or by will is then used to satisfy the testator's debts.[100] But where by virtue of subsection 25(2) of the *Wills Act* a bequest includes personal property that the testator has power to appoint, the property that is subject to the appointment becomes part of the bequest of personal

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[97] In *Waugh Estate* v. *Waugh*, *supra* note 92 at para. 20, the Man. Q.B. declined to follow *Re Meikle Estate*, *supra* note 94.

[98] See discussion of cases under class 1 of assets.

[99] This position is supported by *Waugh Estate* v. *Waugh*, *supra* note 92.

[100] *Jenney* v. *Andrews* (1822), Madd. & G 264, 56 E.R. 1091; *Fleming* v. *Buchanan* (1853), De. G.M. & G. 976, 43 E.R. 382; *Beyfus* v. *Lawyley*, [1903] A.C. 411. See also 14 Halsbury's Laws of England, *supra* note 9 at 293.

property. This means that it would be subject to payment of debts in the same fashion as the bequest of personal property and would not be postponed until all of the testator's property is depleted in payment of debts.[101]

4. Contribution among assets in the same class

Assets within a given class must contribute rateably to the payment of debts.[102] This principle is best illustrated by way of example. Assume that the testator gave $1000 to A and $500 to B and that debts of $300 had to be paid from the moneys set aside for payment of the general legacies. The legacies would have to contribute rateably to payment of debts, so $200 would be paid from the $1000 legacy and $100 would be paid from the $500 legacy. Ultimately, the creditor would receive $300, A would receive $800 and B would receive $400.[103]

5. Variation of the order by testator

a. Introduction

The order does not apply where the testator expresses a contrary intention in the will. Nonetheless, there is a strong presumption in favour of the primary liability of the general personal estate. This point is made in *In re Banks*[104] as follows:[105]

> The personal estate is primarily liable for the payment of debts and funeral and testamentary expenses; but the testator may exonerate it, either by express words or by an indication of intention to be found in the will which leads to the Court being judicially satisfied that it was the testator's intention to exonerate it. It is not enough that he charges his real estate with the

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[101] *Williams* v. *Williams*, [1900] 1 Ch 152, and Halsbury's Laws of England, Vol. 14, *supra* note 9 at 293. Subsection 25 of the *Wills Act*, R.S.A. 1980, c. W-11 reads as follows:

> 25(2) Except when a contrary intention appears by the will, a bequest of
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> (a) the personal property of the testator, or
>
> (b) personal property described in a general matter,
>
> includes any personal property, or any personal property to which the description extends, that he has power of appoint in any manner he thinks proper and operates as an execution of the power.

[102] Lee, *supra* note 9 at 15-16 and *Tombs* v. *Roch*, *supra* note 87. This general rule is subject to a contrary intention expressed by the testator. In the case of general legacies, a legacy made in payment of a debt owed by the testator to a beneficiary does not abate with legacies given to volunteers: *Re Jansen Estate* (1984), 18 E.T.R. 243 (Sask. Q.B.), aff'd (1986), 23 E.T.R. 55 (Sask. C.A.). However, there are contrary decisions cited in this decision.

[103] For cases illustrating the general rule that pecuniary legacies must abate rateably see *Lindsay* v. *Walbrook* (1897), 24 O.A.R. 604 (Ont. C.A.), and *Re Estate of Jost* (1940), 15 M.P.R. 477 (N.S.S.C.).

[104] *Supra* note 34.

[105] *Ibid.* at 549.

> payment of debts. It is necessary to find, not that the real estate is charged, but that the personal estate is discharged.

Many Canadian decisions have applied this principle.[106]

There are three ways of overcoming the presumption that the general personal estate not bequeathed at all, or by way of residue only, is the primary fund for the payment of debts and funeral and testamentary expenses. First, the testator can charge a specified fund of personal property, other than residue, with payment of debts and funeral and testamentary expenses. This is seen as an intention to vary the order of application of assets, and it relieves the residuary personal property from its primary liability to pay debts.[107] Second, the testator can charge real property with payment of the debts and funeral and testamentary expenses and exonerate the general personal estate, either expressly or by necessary implication.[108] Third, the testator can create a mixed fund of real property and personal property and direct that his or her debts be paid out of that fund.[109] Let us look at each of these categories in turn.

b. Expression of contrary intention

i. Specify certain fund of personal property for payment of debts

Where a testator charges a specific fund of personal property, other than residue, with the payment of debts, this discharges the general personal estate from its primary liability.[110] However, this rule only applies where the testator disposed of the residuary personal estate. If the testator did not dispose of the residuary personal estate, it is applied in payment of debts before the personal property

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[106] *Re McGarry*, *supra* note 34; *Re Craig*, *supra* note 83; *Re Lord Strathcona's Estate*, *supra* note 34; *In re Youngberg Estate*, *supra* note 34; *Re Watson* (1922), 52 O.L.R. 387, aff'd by the Ont. S.C.A.D. at 52 O.L.R. 392; *Re Lockie*, *supra* note 51; *In re Kusy Estate*, *Jackim* v. *Kusy*, *supra* note 32.

[107] Halsbury's Laws of England, Vol. 14, *supra* note 9 at 663; *In re Smith*, [1913] 2 Ch. 216; Woodman, *supra* note 9 at 18 and 25.

[108] Woodman, *supra* note 9 at 17 and 25; Halsbury's Laws of England, Vol. 14, *supra* note 9 at 286, footnote (q).

[109] Woodman, *supra* note 9 at 18-19 and 25; Halsbury's Laws of England, Vol. 14, *supra* note 9 at 287, para. 666; *Webb* v. *De Beauvoisin* (1862), 31 Beav. 573, 54 E.R. 1261; *Vernon* v. *Earl Manvers (No. 2)* (1862), 31 Beav. 623, 54 E.R. 1281 (Master of Rolls).

[110] Woodman, *supra* note 9 at 18. See also 14 Halsbury's Law of England, *supra* note 9 at 286, para. 663, *Browne* v. *Groombridge* (1819), 4 Madd 495, 56 E.R. 788; *Choat* v. *Yeats* (1819), 1 Jac. & W. 102, 37 E.R. 314; *Vernon* v. *Earl Manvers*, *ibid.*; *Webb* v. *De Beauvoisin*, *ibid*; *Trott* v. *Buchanan* (1885), 28 Ch. D. 446; *Higgins* v. *Dawson*, [1902] A.C. 1 (H.L.).

charged with payment of debts.[111] *In re Smith*[112] illustrates the general principle. In that case, the testator had assets in England and Argentina. He devised and bequeathed a farm in Argentina, both the land and personal property, to his trustees on trust to sell the same and pay the net proceeds to two brothers, subject to payment of legacies and debts, funeral and testamentary expenses. The residue of his real and personal property, which was not subject to this charge, was to be held on trust for the benefit of the testator's nephew. The nephew argued that by charging the property in Argentina with payment of debts, the testator had exonerated the residuary personal property from its primary liability for payment of legacies and debts. The court viewed the will as a devise of Argentinean real property charged with payment of legacies and debts and a bequest of Argentinean personal property charged with payment of legacies and debts. It did not see the will as creating a mixed fund for payment of debts and legacies.

The court noted the difference between a charge on real property and a charge on personal property. A charge on real property does not exonerate the residuary personal property from its primary liability for payment of debts. In contrast, a charge of legacies and debts on specifically bequeathed property does exonerate the residuary personal property from its primary liability. The court held that upon a true construction of the will, the testator had charged his personal property on the farm in Argentina with payment of legacies and debts in exoneration of his residuary personal property. The court directed that the value of the Argentinean personal property be determined.

Two Canadian decisions also illustrate this general principle. In *Eastern Trust Company* v. *Mills*,[113] the testator directed that his debts and funeral and testamentary expenses be paid out of certain personal property. It was only after exhaustion of this fund that the court had to resort to the common law order to determine which assets were to be used to pay the balance of the debts. In *Waldner*

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[111] *Ibid.* and *Hewett* v. *Snare* (1847), 1 De G. & Sm. 333, 63 E.R. 1092; *Lomax* v. *Lomax* (1849), 12 Beav. 285, 50 E.R. 1070; *Newbegin* v. *Bell* (1857), 23 Beav. 386, 53 E.R. 152.

[112] [1913] 2 Ch 216.

[113] *Supra* note 63.

Estate v. *Salmon*,[114] the testator specified the personal property to be used to pay debts. In that case, the testator first directed that all his debts and funeral and testamentary expenses be paid out of the estate. Then, when dealing with the money in the bank and the cash in hand, he gave the balance of the same to his two sisters. The court held that the testator had intended his debts and expenses to be paid out of the balance of money in bank and the cash on hand, and not out of the other personal property that formed part of the residue or the real property.

But this rule only applies when the testator actually charges certain personal property with payment of debts. An implied charge for payment of debts that arises from a direction to pay debts does not make specific bequests that are subject to the implied charge liable for payment of debts before personal property undisposed of or which passes by way of residue only. See the discussion of this point at page 13.

ii. Exonerate the general personal estate and encrate real property

While it is clearly established that the testator must express an intention to exonerate the general personal estate, determining if the testator has done so is simply a matter of construction of the will. Nevertheless, this determination is often one of great difficulty, and being a matter of construction, it is not safe to rely on any particular decision because of some analogy of circumstances to those involved in another situation.[115]

Although many cases deal with this issue,[116] two cases will be discussed to illustrate the principle. In *In re Banks*, the testator gave all of his personal property to his deceased son's widow and devised two cottages to his daughter. He then gave the rest of his real property to his trustees, subject to payment of debts and testamentary expenses, upon trust for the benefit of his deceased son's widow and children. At the end of the will he directed that none of the real property should be sold while male descendants of the name of Banks were still living. The court held

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[114] *Supra* note 51.

[115] *Re Watson*, *supra* note 106.

[116] See *Harrold* v. *Wallis* (1863), 10 Grant's Chancery Reports 197; *In re Banks*, *supra* note 34; *Re Mulholland and Morris* (1910), 20 O.L.R. 27; *Re Craig*, *supra* note 83; *Re Lord Strathcona's Estate*, *supra* note 34; *Re Watson*, *ibid.* and cases cited in Halsbury's Laws of England, Vol. 14, *supra* note 9 at 286, fn. (q).

that on the whole the will did not express an intention that the personal property should not bear primary liability for payment of the debts. In fact, the will suggested the opposite because of the direction that none of the real property be sold while male descendants of the name Banks were living.

In *Re Watson*,[117] the testator devised and bequeathed to his wife the east-half of his home during her lifetime, part of the furniture, and an annuity of $150. He gave his daughter $1000 and a piano. Payment of the annuity and legacy was charged on his real property, which in turn was devised to his son subject to this charge. The testator also provided that, in addition to the real property, the son was to have the rest and residue of the personal property of every kind. Should the son die without issue before the mother's death, the real property was to go to the daughter. By codicil, the testator gave his daughter the money in the bank and certain mortgages. The testator died survived by his wife, daughter and son. The son died without issue while his mother was alive, with the result that the personal property vested in the son but the remainder interest in the real property vested in the daughter. The daughter argued that the legacy and annuity must be paid out of the residuary personal estate, and therefore, must be paid by the son's estate.

In interpreting the will and codicil, the Ontario Supreme Court, Appellate Division, held that the testator had shown an intention to exonerate the residuary personal property because:

(1) the testator made it clear that the payment of the annuity and legacy was to be a charge on the lands only, and

(2) the codicil giving the money and mortgages to the daughter did not suggest that these were to be charged with payment of the annuity and legacy.

The court dismissed the claim against the estate of the son and affirmed that the annuity and legacy were charged upon realty only and that the residuary personal property was exonerated.

Even though the general personal estate not bequeathed at all, or given by way of residue only, has been exonerated from its primary liability for payment of

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[117] *Supra* note 106.

debts, this liability is reactivated if it turns out that the property that the testator intended the debts to be paid from was insufficient for this task.[118]

iii. Create a mixed fund of real and personal estate

The creation of a mixed fund of real and personal estate for payment of debts and funeral and testamentary expenses is another means of exonerating the general personal estate from its primary liability for payment of the same. *Roberts* v. *Walker*[119] was the earliest authority to establish this point. In that decision, the court held:[120]

> It is a question of intention; and it must be admitted that in order to throw upon the real estate any part of burden to which the personal estate is primarily liable, the intention of the testator must be manifest. When a testator creates from real estate and personal estate a mixed and general fund and directs the whole fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estates, which have been converted into that fund, shall answer the stated purposes and every of them pro rata according to their respective values.

It is not always easy to determine when a testator has created a mixed fund and there are many English and Canadian cases that deal with this issue.[121] The case law has been summarized as follows:[122]

> A gift of real and personal estate together, coupled with a direction to sell and to pay debts or legacies out of the proceeds, creates a mixed fund, and in that case the realty and personalty are liable rateably for debts; a direction that the real estate is to be sold, and that the proceeds of sale are to be considered as part of the personal estate, will have the same effect. It is not necessary that there should be an absolute conversion directed by the will; a power of sale may be sufficient if, from the terms of the will as a whole, it can be gathered that the testator had the intention of creating a mixed fund. The mere gift of real and personal estate together, coupled with a direction to

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[118] *Re Watson*, *ibid.* citing *Gittins* v. *Steele* (1818), 1 Swanst 24 at 29. See also *The Eastern Trust Company* v. *Mills*, *supra* note 63.

[119] (1830), 1 Russ & M 752, 39 E.R. 288 (Ch.).

[120] *Roberts* v. *Walker*, *ibid.* at 292.

[121] *Roberts* v. *Walker*, *ibid.*; *Boughton* v. *Boughton* (1848), 1 H.L. Cas. 406, 9 E.R. 815; *Allan* v. *Gott*, *supra* note 30; *Bellairs* v. *Bellairs* (1873), L.R. 18 Eq. 510; *Toomey* v. *Tracey* (1883), 4 O.R. 708; *Re Watkins* (1905), 1 W.L.R. 457 (B.C.S.C.), aff'd (1906), 3 W.L.R. 471 (B.C.C.A.); *Re Le Brun*, *supra* note 63; *Re Lord Strathcona's Estate*, *supra* note 34; *Re Carmichael*, [1945] 1 D.L.R. 64 (Ont. H.C.J.); *Re Thompson*, [1955] O.W.N. 521 (H.C.)

[122] Halsbury's Laws of England, Vol. 14, *supra* note 9 at 287, para. 666. This statement of the law was adopted by the Manitoba Court of Appeal in *Re Lord Strathcona's Estate*, *ibid.*

> pay debts or legacies, or a trust for the payment of debts or legacies, is not by itself sufficient to constitute a mixed fund, in the absence of words in the will showing an intention on the testator's part that his real estate should be sold for the purposes of meeting the debts or legacies.

The following cases illustrate the concept of a mixed fund. In *Roberts* v. *Walker*, the testatrix by will gave to the trustees all her real and personal property on trust to sell the real and personal property and to use the proceeds to:

(1) Pay her just debts, funeral expenses and cost of administration,
(2) Pay several legacies mentioned in the will one year after she died,
(3) Pay legacy duties to the government so that each legatee enjoys the entire bequest without reduction, and
(4) Pay the residue of the said trust moneys to person(s) the testatrix would appoint in a codicil as she had not at that point decided who would receive the residue.

The testatrix died without preparing the codicil and the question arose as to whether the real property must take its pro rata share of burden of payment of debts. The court held that the will created a mixed fund and that the Master must compute the values of the real property and personal property so that each could shoulder their pro rata share of the purposes of the mixed fund, including payment of debts, legacies and legacy duties. The residue was undisposed of and, therefore, as far as the fund consists of real property, the heir was to have the benefit of it. And as far as the fund consists of personal property, the next of kin were to have the benefit of it.

In re Smith[123] was another case involving the issue of whether the testator had created a mixed fund. The testator gave–subject to payment of legacies and debts, funeral and testamentary expenses–certain property in Argentina to the trustees upon trust to sell, convert and get in the same with the power to postpone such sale indefinitely, and after payment of expenses of sale, to pay the proceeds to his two brothers. The judge held that the testator had not created a mixed fund because the trust for conversion was not given for the purposes of enforcing the charge on the Argentinean property for payment of debts and funeral and testamentary expenses. The testator had merely made a gift of the Argentinean real

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[123] *Supra* note 107.

property and personal property to the same persons and subject to the same charge. This did not constitute a mixed fund created for the purpose of paying the debts and funeral and testamentary expenses.

In *Re Le Brun*,[124] the testator by his will devised and bequeathed the whole of his estate, which included both real and personal property, to trustees upon trust to convert into money such part of his estate as should not consist of money, except his home and cottage that were subject to a life estate in favour of his wife. He then directed the trustees to pay his debts and funeral and testamentary expenses and mortgage debts. The Ontario Court of Appeal held that the testator had created a mixed fund because he directed sale of the real estate and that this fund was charged with payment of mortgage debts as well as the other debts of the testator. The result was that the personal property and the real property making up the mixed fund must contribute rateably to payment of the debts charged on the mixed fund. This was the case even though the fund derived from all of the real property and personal property except the home and cottage.

Thanks to an inventive argument designed to extract more succession duty from Lord Strathcona's estate, the issue of a mixed fund also arose in *Re Lord Strathcona's Estate*.[125] In that case, the will vested the entire estate worth $28.9 million in trustees upon the following trusts:

(1) to pay his debts and expenses of the trusts,
(2) to pay the trustees 500,000 pounds,
(3) to make certain bequests, some of them involving long trusts, and pay a number of legacies, and
(4) to transfer the whole residue of estate, both real and personal, wherever situated, to his daughter.

The testator also gave the trustees the fullest powers to administer and manage the estate, including the power to sell any of the assets in the estate.

The Provincial Treasurer argued that the testator had intended to create a mixed fund for payment of legacies because he gave the entire estate to the trustees

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[124] *Supra* note 63.

[125] *Supra* note 34.

with a power of sale and directed that the legacies be paid. The Manitoba Court of Appeal rejected this argument. It held that the testator did not create a mixed fund out of which legacies are payable. It came to this conclusion for the following reasons:[126]

(1) It is improbable that the testator thought to burden the real estate in Manitoba with a proportionate part of the legacies. The personal estate was worth $24 million and the Manitoba real estate was worth only $2.4 million. There was no reason to create a mixed fund because the personal estate could pay the legacies nine times over.

(2) The trustees had the power to transfer investments, instead of cash, to legatees. This is inconsistent with creation of mixed fund for payment of legacies.

(3) The powers given in the will to deal with the real estate were given for other obvious purposes, not the creation of a blended fund for payment of debts and legacies.

(4) There is nothing in the will where the testate directs the trustees to sell the real estate for the purpose of meeting debts or legacies.

(5) The will gives power to the trustees to sell all or any part of the estate, but it contains no directions to pay legacies out of any particular fund. It also directs the trustees to pay the legacies, without saying how or out of what part of funds such payment should be made.

Given these circumstances, the Court held that the personal estate remains the primary fund for payment of legacies.

c. *Penlington v. Penlington*

Penlington v. *Penlington*[127] is a recent Alberta decision in which the issue of which assets would be used to pay debts arose. The decision seems to be an example of a testator indicating which assets were to be used for payment of debts such that the common law order did not apply. However, other parts of the decision suggest another basis for the decision. In this case, the estate consisted of a bank account

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[126] Each of the three judges wrote a decision. Although unanimous in result, they used a variety of facts to conclude that the testator did not create a mixed fund for payment of legacies. What follows is a summary of all the facts relied upon in the three judgments. Some were relied upon by more than one judge.

[127] (1995), 68 Alta. L.R. (3d) 341 (Alta. Surr. Ct.)

and term deposit held at First Calgary Financial, furniture and a house.[128] The bank account and term deposit were the subject of a specific bequest, and the furniture and house passed by way of residue. The key provision of the will read as follows:

> I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, to my said Trustee upon the following trusts, namely:
>
> (a) To use their discretion in the realization of my estate with power to sell, lease, convert or otherwise deal with my assets in order to carry out my intentions.
>
> (b) To pay out and charge to my general estate all my just debts, funeral and testamentary expenses and any inheritance taxes.
>
> (c) To pay all monies in the First Calgary Financial Credit Union on 17th Avenue to my granddaughter CARRIE ANN PENLINGTON, for her own use absolutely.
>
> (d) To pay or transfer the residue of my estate to my sons THEODORE PENLINGTON and RICHARD PENLINGTON, for their own use absolutely
>
> ....

The court interpreted subsection (b) when read along with subsections (c) and (d) as an indication by the testator that the debts be paid *pro rata* from the specific bequest and residue. The court did not view subsection (b) as charging the specific bequest or residue with payment of debts, notwithstanding the use of the word "charge" in that subsection.

What is unclear in the decision is whether the court based its decision on the expression of intention found in the will, or whether it applied the common law order as set out in Widdifield on Executors' Accounts, 5th ed. at page 86. In this case, the estate consisted of class 1 assets (i.e. the furniture that passed by way of residue) and class 6 assets (i.e. the specific bequest of the bank account and term deposit at First Calgary Financial Credit Union, and the residuary devise that consisted of the house). Given that the bulk of the estate consisted of class 6 assets, the specific bequest and the residuary devise not charged with payment of debts would both contribute pro rata to the debts, but only after depletion of class 1 assets in payment of debts. Nevertheless, both the intention expressed by the testator, and the common law order as set out in Widdifield's list[129] were given as

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[128] These are the only assets mentioned in the decision, although there may have been others. Our analysis proceeds on the basis that these were the only assets found in the estate.

[129] In *Penlington* v. *Penlington*, *supra* note 127 at 347, the court noted:

(continued...)

reasons to support the decision. However, they cannot both apply at the same time, and therefore, the decision is better seen as a case in which the testator expressed a contrary intention because this rationale supports the decision in its entirety.

B. In payment of secured debts

At one time, payment of secured debts was treated in the same manner as payment of unsecured debts. The devisee of mortgaged land could look to the general personal estate for payment of the debt secured by the mortgage.[130] This was changed in the last half of the 19th century by three English statutes, known collectively as *Locke King's Acts*.[131] By virtue of these acts, "the successor to an interest in encumbered real or chattel real estate is, in the absence of a direction to the contrary, precluded from throwing the burden of the encumbrance upon the deceased's personal or other real estate, whether the encumbrance be by way of mortgage or equitable charge, or in respect of a vendor's lien for unpaid purchase-money, and whether the deceased died intestate or testate".[132]

Section 40 of the *Administration of Estates Act*,[133] which derives from the *Locke King's Acts*, reads as follows:

> 40(1) When a person
>
> (a) dies possessed of,
>
> (b) dies entitled to, or
>
> (c) acting under a general power of appointment purports by his will to dispose of,
>
> an interest in property that at the time of his death is charged with the payment of money by way of mortgage and the deceased person has not by will, deed or other document signified a contrary intention, the interest so charged is, as between the different persons claiming through the deceased, liable primarily for payment of the charge.

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[129] (...continued)
Paragraph 6 of Widdifield's list is the situation which would apply to the case at bar wherein specific legacies and residuary devises not charged with debts would contribute *pro rata* to the debts.

[130] Woodman, *supra* note 9 at 87.

[131] *Real Estate Charges Acts, 1854, 1867 and 1877* (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34). The three acts are to be read together.

[132] Halsbury's Laws of England, Vol. 14, *supra* note 9 at 288, para. 669.

[133] R.S.A. 1980, c. A-1. In 1927, this section was first enacted in Alberta as *The Property Charges Act*, S.A. 1927, c. 22. That Act was repealed in 1969 and was re-enacted as section 41 of *The Administration of Estates Act*, S.A. 1969, c. 2.

(2) Each part of the interest referred to in subsection (1) shall according to its value bear a proportionate part of the charge on the whole of it.

(3) A contrary intention shall not be deemed to be signified

(a) by a general direction for the payment of some or all debts of the testator out of his personal property or his residuary real and personal property or his residuary real property, or

(b) by a charge of debts on that property

unless the contrary intention is further signified by words expressly or by necessary implication referring to all or some part of the charge mentioned in subsection (1).

(4) Nothing in this section affects the rights of a person entitled to the charge referred to in subsection (1) to obtain payment or satisfaction thereof, either out of the other assets of the deceased or otherwise.

(5) In this section, "mortgage" includes

(a) a charge, whether equitable, statutory or of any other nature, and

(b) a lien for unpaid purchase money.

The section does not cover agreements for sale of land.[134] Query whether the section also applies to personal property that has been charged with the payment of money by way of mortgage. This question arises because although s. 40 of the *Administration of Estates Act* closely patterns *Locke King's Acts*, it is different in one aspect. The English Acts refer to interests in lands which are charged with payment of money by way of mortgage. The Alberta section refers to property charged with payment of money by way of mortgage. Does this change in wording mean that the Alberta section applies to all property, including personal property? Even if it does, does "payment of money by way of mortgage" catch a personal property security interest?

The section applies only if the deceased person has not by will, deed or other document signified a contrary intention. *In re Brun*[135] is an example of a case in which the testator expressed a contrary intention. In that case the testator by his will devised and bequeathed his entire estate to his trustees upon the following trusts. As soon as convenient after his death, the trustees were to convert into

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[134] *In re Walz Estate*, [1923] 3 W.W.R. 1306 (Sask. K.B.).

[135] *Supra* note 63.

money such parts of his estate that did not consist of money, except for the home and cottage which his wife had a life interest in, and then pay the testator's debts and funeral and testamentary expenses and "any charge by way of mortgage that may be against [his] property at the time of [his] death". This amounted to a direction to pay the mortgage debts, among others, out of the fund and was an expression of a contrary intention in the will such that section 38 of the *Wills Act*[136] did not apply.

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[136] R.S.O. 1914, c. 120, s. 38. This section derives from *Locke King's Acts* and is similar to s. 40 of the *Administration of Estates Act*, R.S.A. 1980, c. A-1.

CHAPTER 3. DIFFERENCES BETWEEN THE LAW OF ONTARIO AND THE LAW OF ALBERTA, SASKATCHEWAN AND MANITOBA

The law of succession in Alberta, Manitoba, Ontario and Saskatchewan derives from England, and therefore the development of the law in these provinces patterns the English experience. Each province takes the law of England as at a certain date as part of its law, but the date varies from province to province.[137] This is how the English common law relating to the application of assets as it applies to the payment of debts became the law in each of these provinces.

At some time, legislation similar to the *Land Transfer Act, 1897* (U.K.) was enacted in each province. Typically, the provincial equivalent was called the *Devolution of Real Property Act*.[138] The key sections would be similar to sections 2(1) and 6 of the *Devolution of Real Property Act* of Alberta,[139] which read as follows:

> 2(1) Real property in which a deceased person was entitled to an interest not ceasing on his death
>
> (a) on this death, notwithstanding any testamentary disposition, devolves on and becomes vested in his personal representative as if it were personal property vesting in him, and
>
> (b) shall be dealt with and distributed by his personal representative as personal estate.
>
> 6(1) In the administration of the assets of a deceased person his real property shall be administered in the same manner, is subject to the same liabilities for debts, costs and expenses, and has the same incidents, as if it were personal property.
>
> (2) Nothing in this Act alters or affects the order in which real and personal assets respectively are applicable, as between different beneficiaries, in or toward the payment of funeral and testamentary expenses, debts or legacies, or the liability of real property to be charged with payment of legacies.

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[137] Alberta takes the law of England as it was on July 15, 1870, subject to such changes made by competent legislation. Ontario takes the law of England as of 1792.

[138] See *Devolution of Real Property Act*, R.S.A. 1980, c. D-34; *Devolution of Real Property Act*, R.S.S. 1978, c. D-27; *The Devolution of Estates Act*, R.S.M. 1987, c. D-70; *Estates Administration Act*, R.S.O. 1990, c. E.22.

[139] *Ibid.*

There are many cases considering the equivalent of sections 2 or 6 of the *Devolution of Real Property Act* of Alberta. They hold that the order in which estate assets were applicable to the payment of debts has not been disturbed by the enactment of such sections.[140]

Of these four provinces, the only province to alter the common law order of application of assets for payments of debts was Ontario, but it did so in a very limited way. Ontario has sections 2 and 4 of the *Estate Administration Act*,[141] which are the equivalent of the sections quoted above. But Ontario also has section 5 of that Act which has no equivalent in the other three provinces. Section 5 reads as follows:

> 5. Subject to section 32 of the Succession Law Reform Act, the real and personal property of a deceased person comprised in a residuary devise or bequest, except so far as a contrary intention appears from the person's will or any codicil thereto, is applicable rateably, according to their respective values, to the payment of his or her debts, funeral and testamentary expenses and the cost and expenses of administration.

Section 2 and 5 have been part of the law of Ontario since 1886,[142] whereas section 4 was introduced in 1910.[143]

The change brought about by section 5 has been described as follows:[144]

> In Ontario, for most purposes, the Estates Administration Act subjects realty to the same rules as personalty. For the purpose of the payment of debts, section 5 provides that realty and personalty "comprised in a residuary devise or bequest" are applicable rateably. Section 4 provides that realty and personalty "shall be administered in the same manner, subject to the same liability for debts". However, section 4 also contains a proviso that "nothing in this section alters or affects as respects real or personal property of which the deceased has made a testamentary disposition the order in which real and personal assets are now applicable to the payment of . . . debts". The courts have held that the proviso to section 4 preserves for Ontario the common law order of application of assets. The only change to the common

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[140] *Re Hopkins Estate*, *supra* note 34; *Re Steacy*, *supra* note 32; *Re Lord Strathcona's Estate*, *supra* note 34; *In re Steward Estate*, [1918] 2 W.W.R. 1090 (Sask. C.A.); *In re Walz Estate*, *supra* note 134; *Re Swayze*, [1938] O.W.N. 524 (Ont. H.C.J.); *In re Rigetti*, *supra* note 32; *In re Kusy Estate*, *Jackim v. Kusy*, *supra* note 32.

[141] R.S.O. 1990, c. E.22.

[142] See *Devolution of Estates Act*, 1886, S.O. 1886, c. 22, ss 4 and 7.

[143] See *Devolution of Estates Act*, S.O. 1910, c. 56, s. 5.

[144] OLRC, *Report on Administration of Estates of Deceased Persons*, *supra* note 9 at 188-89.

law is effected by section 5, which renders real and personal property comprised in a residuary devise or bequest equally liable for the payment of debts. Section 5, moreover, has been interpreted narrowly. It has been held to apply only where both real and personal property is comprised in a single residuary gift. Further, since a "residuary bequest" requires that something be taken out of the personal estate and that the bequest apply only to the balance, it has been held that a gift of "all" the testator's personal estate was not "residuary" within the meaning of section 5.

Where a will contains a residuary clause that disposes of the residue of both real and personal property, section 5 will apply. The first assets to be applied to the payment of debts will be the residuary realty and personalty, which, under section 5, is treated as a single fund. If the residuary realty and personalty is insufficient to pay the debts in full, then the effect of section 5 is spent, the proviso to section 4 applies, and the order of abatement of the general and specific legacies and devises is the common law order. Where a will contains no effective residuary clause, or no residuary clause disposing of both realty and personalty, section 5 has no application. The proviso to section 4 will apply, and the order of application of assets will be the common law order, set out above.

CHAPTER 4. REFORM

A. Need for reform

This archaic area of the law is badly in need of revision for the following reasons. First, the historical reasons for the development of the rules are no longer relevant with the result that the distinctions made in the rules are no longer justifiable. For example, how does one justify the fact that if the testator devises realty on trust for payment of debts, the debts must still be paid first from the residuary personal property?[145] Second, determining what the rules are involves reading case law developed over a 225 period. This alone speaks of the need for a clear and simplified statutory order. Third, as one would expect, a body of case law developed over this length of time is full of contradictory decisions. In this area, the more one reads, the more confused one becomes. Fourth, the law is uncertain. What falls into class 4? What exactly is the effect of a direction to pay debts?

What is needed is a clear and simplified statement of the order of application of assets for payment of debts. No distinction should be made between personal property and real property. The simplified order should reflect the way in which a reasonable testator would want his or her assets applied in the payment of debts and funeral and testamentary expenses.

B. Suggestions for Reform

1. Payment of unsecured debts

The order developed by the OLRC in its *Report on Administration of Estates of Deceased Persons* is a good option for reform. According to these proposals, the order of application of assets to meet the unsecured debts and liabilities of an estate should be as follows:[146]

(a) property specifically charged with the payment of debts or left on trust for the payment of debts;

(b) property passing by way of intestacy;

(c) residuary property;

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[145] QLRC, *A Report on the Law Relating to Succession*, *supra* note 21 at 1.

[146] OLRC, *Report on Administration of Estates of Deceased Persons*, *supra* note 9 at 189-190.

(d) general legacies and devises;[147]

(e) specific legacies and devises;

(f) property over which the deceased had a general power of appointment that she might have exercised for her own benefit without the assent of any other person, where the property is appointed by will.

Underlying this order are several basic concepts. First, each class would include real property and personal property that falls within the class, and no distinction is made between real property and personal property. For example, in the case of class (b) listed above, all personal property and real property passing by way of residue would contribute proportionately to the payment of unsecured debts and liabilities. Second, property charged with payment of debts and property given in trust for payment of debts form one class because there is no reason to make a distinction between these types of property. Both methods are an expression of the testator's intention as to which assets should be used to pay debts. Third, it is assumed that by virtue of making a gift of a specific asset, the reasonable testator intends to benefit specific beneficiaries over general legatees. Finally, the assets within each class would contribute rateably to payment of debts.

Of course, the statutory order would always be subject to a contrary intention in the will. Given this, it may be questioned as to why the first category forms part of the order at all. The OLRC concluded that this class should be included because it emphasizes that the testator's intention should govern and it will give guidance to personal representatives. We agree with this view.

We would, however, make four suggestions for improvement to this order. First, we would combine property passing by way of intestacy and residuary property into one class. We see no reason to differentiate between these two types of property when it comes to payment of debts. In fact, personal property passing by way of intestacy or by way of residue was the first class under the common law order for centuries. Furthermore, breaking them into two classes has caused

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[147] Query whether there is such a thing as a general devise. The common law order makes no reference to a general devise and deals only with residuary devises and specific devises. In *Lancefield v. Iggulden*, *supra* note 36, the Lord Chancellor held that, both before and after the enactment of the *Wills Act, 1837* (U.K.), 15 & 16 Vict., c. 24, a residuary devise of real estate was treated as specific. At page 58, Woodman, *supra* note 9, indicates that a gift of all the testator's real property is a residuary devise but cites conflicting authority. In contrast, Feeney, *The Canadian Law of Wills*, 3rd (Toronto: Butterworths, 1987), Volume 2 at 179 says that there are general and specific devises.

problems in respect of the lapse of a share in residuary. The difficulty arises in determining whether the residue is that which remains after payment of debts. If this is the case, then residue can only be determined after payment of debts, and a lapsed share of residue will not be primarily liable to pay debts, even though it is property that passes by way of intestacy.[148] We see no reason to introduce such intricacies and prefer to treat them as one class.

Our second suggestion for improvement relates to that convoluted body of law governing when a court will imply that land is charged with payment of debts and funeral and testamentary expenses. As discussed earlier in this report,[149] in an effort to protect ordinary creditors, the Court of Chancery readily inferred an intention that debts were to be paid out of land. A general direction for payment of debts was usually sufficient. The priority position of specialty creditors and the need to protect ordinary creditors has long since passed and, therefore, the need to make such an inference no longer exists. Therefore, we recommend that a general direction to pay debts or a direction that an executor should pay debts do not by themselves create a charge on property for payment of debts. To bring assets within the first class the testator must expressly charge certain property with payment of debts or create a trust for payment of debts.[150] Nevertheless, it is likely that a court would construe a direction to pay debts followed by a gift of residue as charging the residue with payments of debts, for the same reasons as given in *Re Bailey*.[151] The effect of such provisions is to bring the residue into the first class under the proposed order.[152]

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[148] See Woodman, *supra* note 9 at 27 and 155-162.

[149] See earlier discussion at 7 and 14-18.

[150] For example, transferring all property in trust to the trustee with a direction to pay debts would mean that all assets in the estate would contribute rateably to payment of debts.

[151] *Supra* note 62.

[152] In England, such expressions were sometimes interpreted as showing a contrary intention such that the statutory order did not apply. This meant that the residue was first resorted to for payment of debts, contrary to the statutory order in England. See Woodman, *supra* note 9 at 27-28. Under our proposals, the result would be the same if the statutory order applied or whether the court viewed such expressions as an indication that the statutory order did not apply. In both cases the residue would be looked to first for payment of debts and funeral and testamentary expenses.

Our third suggestion for improvement deals with property left on trust for payment of debts. Wills in Alberta are frequently worded such that all assets are given to the personal representative on trust to carry out certain obligations. One of those obligations, and usually the first, is to pay the debts of the deceased. We view such a direction as a reconfirmation of the personal representative's obligation to pay debts and not as a creation of a trust for payment of debts so as to make all estate assets liable to contribute proportionally to payment of debts. A general reaffirmation of the obligation to pay debts should not create a trust for payment of debts such as to make all assets in the estate liable for payment of debts.

Our fourth suggestion for improvement relates to class (f) of the OLRC proposal. We found the language confusing and think that it could be improved if it clearly catches only property over which the deceased had a general power of appointment that has been expressly exercised by will. Such property is considered property of the testator by virtue of section 2(2) of the *Devolution of Property Act*.[153]

We conclude this discussion by emphasizing three key points. First, this statutory enactment of marshalling rules will not affect a creditor's right to enforce payment of the debt against any asset in the estate. Second, it will also not determine what money the personal representative actually uses to pay creditors because the personal representative remains entitled to satisfy creditors out of the first available moneys. So if the testator gave a specific gift of a bank account and a residuary gift, the personal representative could use the money in the bank account to pay the debts pending sale of the assets that pass by way of residue. The proposed marshalling rules only deal with the ultimate adjustments among the various beneficiaries after payment of debts and funeral and testamentary expenses. This was the case under the common law order and should continue to be the case under the proposed statutory order. Finally, at this time we make no

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[153] R.S.A. 1980, c. D-34. Section 2(2) reads as follows:
2(2) A testator shall be deemed to have been entitled at his death to any interest in real property passing under a gift contained in his will and that operates as an appointment under a general power to appoint by will.

recommendations for change regarding payment of general legacies.[154] It could be argued that a testator who gives a pecuniary legacy intends that it be received and that both general personal property and residuary devises should be available for payment of such a gift. We do not address this issue in this report, and leave it to be considered in future reports dealing with the law of succession.

RECOMMENDATION No. 1

For the purpose of marshalling, the order in which assets are applied in payment of unsecured debts and liabilities should be as follows:

(a) property specifically charged with the payment of debts or left on trust for the payment of debts;
(b) property passing by way of intestacy and property passing by way of residue;
(c) general gifts of property;
(d) specific gifts of property;
(e) property over which the deceased had a general power of appointment that has been expressly exercised by will.

RECOMMENDATION No. 2

Each class should include both personal property and real property, and no distinction should be made between the two types of property within a given class.

RECOMMENDATION No. 3

Each asset within a given class should contribute rateably to payment of debts.

RECOMMENDATION No. 4

To charge property with payment of debts or create a trust for payment of debts, a testator must do something more than:

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[154] These rules are summarized by Woodman, *supra* note 9 at 7 as follows:

> [T]he general rule was that general legacies were payable only out of the personalty of the deceased not specifically bequeathed, and would fail if there was no personalty out of which they could be paid: *Robertson* v. *Broadbent* (1883), 8 App. Cas 812 at 815; *Re Cameron* (1884), 26 Ch D. 19 at 25, 26; . . . but this rule gave way to an intention, either expressed or implied, of the testator that the legacies should be paid out of other property: *Robertson* v. *Broadbent* (1883), 8 App. Cas. 812; or could be varied by the application of the doctrine of marshalling: *Re Roberts*, [1902] 2 Ch 834.

(a) give a general direction that debts be paid,
(b) give a general direction that the executor pay the testator's debts, or
(c) impose a trust that the testator's debts be paid.

RECOMMENDATION No. 5
The statutory order of application of assets may be varied by the will of the deceased.

2. Payment of secured debts

We recommend that the rules relating to payment of secured debts apply to mortgages of land as well as charges on personal property. Therefore, the wording of section 40 of the *Administration of Estates Act* should be refined to include the types of security interests prescribed by the *Personal Property Security Act*.[155] In addition, as there is little difference in purpose between a debt secured by a mortgage of land and a purchase price secured by an agreement for sale, section 40 should be expanded to include agreements for sale.

Another issue is whether section 40 of the *Administration of Estates Act* should be expanded more dramatically. Presently, the section covers consensual security interests created by the testator and ignores non-consensual security interests. A non-consensual security interest is an interest in the property of the debtor that secures payment of performance of an obligation that arises by reason of common law and statutory liens, rights of distress, statutory charges, deemed trusts and statutory trusts.[156] Examples would include a garagemen's lien, real property taxes registered against title, or a statutory charge created in favour of the Workers' Compensation Board. Sometimes the non-consensual security interest arises in respect of an asset connected to the debt owing, and sometimes it arises in respect of a debt unrelated to the asset. We seek input from lawyers as to whether these non-consensual security interests arise with sufficient frequency in the administration of estates to justify an expansion of section 40 of the *Administration of Estates Act*. We also seek input as to the scope of such expansion. Should a

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[155] S.A. 1988, c. P-4.05.

[156] Roderick J. Wood and Michael I. Wylie, "Non-consensual Security Interests in Personal Property" (1992) 30 Alta. L. Rev. 1055 at 1056.

particular asset be the primary source for payment of a debt secured by a non-consensual security interest where the debt arises in respect of that asset? Or will this result in unnecessary sale of assets for payment of small debts? What would be the test for determining if the debt was sufficiently connected to the asset such that the asset should carry the primary burden of satisfying the debt?

RECOMMENDATION No. 6
Section 40 of the *Administration of Estates Act* should be expanded to include agreements for sale of land and security interests prescribed by the *Personal Property Security Act*.

REQUEST FOR COMMENT: Non-consensual security interests
Should property that is subject to a non-consensual security interest be primarily responsible for payment of the obligation secured by the non-consensual security interest?

3. Payment of income tax triggered by death of testator

Another recurring problem arises by reason of income tax triggered by the death of the testator.[157] The problem most frequently arises by reason of registered retirement savings plans ('RRSP'), but can also arise upon the deemed sale of land or shares or other property on the death of the testator. Several lawyers have suggested to us that the assets in the RRSP should be primarily responsible for the income tax triggered by it because this is what most testators want to happen. They point to unhappy situations in which a testator wished to benefit two children equally, by giving one the RRSP and the other cash of equal value. The income tax triggered by the deemed position of the RRSP is paid from the cash, leaving one child with substantially more, and the other with substantially less, than the testator intended. This is a matter easily dealt with at the will planning stage. The problem arises, therefore, most often in wills drafted by lay persons.

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[157] For example, by virtue of s. 70(5) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the testator is deemed to have disposed of capital property immediately before his or her death. By virtue of 146(8.8) of the Act, the taxpayer is deemed to have received, immediately before his or her death, certain amounts as a benefit under the deceased's registered retirement savings plan if the beneficiary of the plan is someone other than the taxpayer's spouse or common law partner.

The issue is whether the majority of testators would want a specific asset that triggers income tax to be primarily responsible for payment of the income tax arising from that asset, or whether the existing default position reflects the expectation of the majority of testators. For example, do most testators want the RRSP to bear the burden of the income tax triggered by the RRSP, or do they want the residuary assets to be used to pay the resulting income taxes? What is the expectation in respect of other assets that trigger income tax on the death of the testator? Before making a recommendation on this point we must hear from lawyers who practice in this area. This input will allow us to better evaluate whether assets that trigger income tax by reason of the deemed disposition of that asset on death should be primarily responsible for payment of that portion of the income tax.

REQUEST FOR COMMENT: Income Tax
Should an asset that triggers income tax by reason of the death of the testator be primarily responsible for payment of the income tax arising from that asset?

APPENDIX A
Cases Considering Effect of Direction to Pay Debts

I. General direction to pay debts

Leigh v. *Earl of Warrington* (1733), 1 Bro. P.C. 511

Shallcross v. *Finden* (1798), 3 Ves. 738

Clifford v. *Lewis* (1821), Madd. & G. 33

Henvell v. *Whitaker* (1827), 3 Russ. 344; 38 E.R. 605

Irwin v. *Ironmonger* (1831), 2 Russ. & M. 53

Graves v. *Graves* (1836), 8 Sim. 43

O'Connor v. *Haslam*, [1854] 5 H.L.C. 170 at 178; 10 E.R. 863

Wrigley v. *Sykes* (1856), 21 Beav. 337

Richard v. *Barrett* (1857), 3 Kay & J. 289; 60 E.R. 1118

Conron v. *Conron* (1858), 7 H.L.C. 168 at 183; 11 E.R. 67

Cook v. *Dawson* (1861), 29 Beav. 123; 54 E.R. 573

Harrold v. *Wallis* (1863), 10 Gr. 197 (U.C. Ch.)

Maxwell v. *Maxwell* (1870), L.R. 4 H.L. 506 at 514

In re Stokes (1892), 67 L.T.R. 223

In re Butler, [1894] 3 Ch. 250

In re Salt, [1895] 2 Ch. 203

In re Roberts, [1902] 2 Ch. 834

In re Kempster, [1906] 1 Ch. 446

Re Moody Estate (1906), 12 O.L.R. 10 (H.C.J.)

Mulholland v. *Morris* (1909), 20 O.L.R. 27 (H.C.)

Re Brown Estate (1909), 18 O.L.R. 245 (H.C.)

Re Le Brun (1916), 30 O.L.R. 135 (S.C.A.D.)

Sissons v. *Chichester-Constable* [1916] 2 Ch. 75

Re Steacy (1917), 39 O.L.R. 548 (H.C.J.)

Re Lord Strathcona's Estate (1918), 2 W.W.R. 499 (Man. C.A.)

Reynolds v. *Harrison* (1921), 66 D.L.R. 398 (Ont. H.C.)

Re Mahaffey (1922), 52 O.L.R. 369

The Eastern Trust Co. v. *Mills* (1923), 56 N.S.R. 341

Re Lockie (1925), 28 O.W.N. 86 (H.C.)

Grayson v. *Walsh* (1925), [1926] 1 W.W.R. 125 (Sask. K.B.)

Re Caulfield (1930), 37 O.W.N. (H.C.)

Re Sorenson (1932), 41 O.W.N. 201

Re Hoare (1932), [1933] 2 D.L.R. 780 (C.A.)

Carpenter v. *Nfld. S.C. Registrar* (1979), 100 D.L.R. (3d) 501

II. Direction that executor pay debts

Finch v. *Hattersley* (1775), 3 Russ. 345

Foster v. *Cook* (1791), 3 Bro. C.C. 347; 29 E.R. 575

Henvell v. *Whitaker* (1827) 3 Russ. 344; 38 E.R. 605

Wasse v. *Heslington* (1834), 3 My. & K. 495; 49 E.R. 188

Hartland v. *Murrell* (1859), 27 Beav. 204; 54 E.R. 79

Re Bailey (1879), 12 Ch. D. 268

Re Tanqueray-Willaume & Landau (1881-82), 20 Ch. D. 465 (C.A.)

Re de Burgh Lawson (1889), 41 Ch. D. 568

Totten v. *Totten* (1890), 20 O.R. 505 (H.C.)

Mercer v. *Neff* (1898), 29 O.R. 680 (H.C.)

Re Tatham (1901) 2 O.L.R. 343

Re Reynolds and Harrison (1921) 66 D.L.R. 398 (Ont. S.C.)

Banque Provinciale v. *Capital Trust Corp.*, [1928] 3 D.L.R. 199; aff'd [1928] 41 D.L.R. 390 (Ont. C.A.)

McCutcheon v. *Smith*, [1933] O.W.N. 692 (C.A.)

Re Jefferies and Calder [1951] O.W.N. 27 (H.C.J.)

Re Proudfoot Estate [1994] O.J. No. 704 (G.D.)

III. Authority to pay debts, as opposed to direction, does not charge real property with payment of debts

Re Head's Trustees & MacDonald (1890), 45 Ch. D. 310 (C.A.)

APPENDIX B
Examples taken from Maitland, Equity (2d) at pp. 263-265

Example 1
The will provides as follows: "I devise Blackacre to A, the rest of my real estate to B, my black horse Doblin to C and the rest of my personalty to D."

Order of application of assets for payment of debts, funeral and testamentary expenses

Class 1	general personal estate	D
Class 6	specific devises, residuary devise, specific legacies	A, B, C - contribute rateably

Proposed order

Class (b)	residuary property, property passing by way of intestacy	B, D
Class (d)	specific gifts	A, C

Example 2
The will provides: "I give my freehold estate called Dale to A, my leasehold house on Brook Street to B, my gold snuff box to C, $1,000 to D, the rest of my realty to E and the rest of my personalty to F.

Order in which assets are applied in the payment of debts, funeral and testamentary expenses

Class 1	general personal estate	F
Class 5	general pecuniary legacy	D
Class 6	specific devises, residuary devise, specific legacies	A, B, C, E - all contribute rateably

Proposed order

Class (b)	residuary property, property passing by way of intestacy	E, F
Class (c)	general gifts	D
Class (d)	specific gifts	A, B, C

Example 3

Testator owns Blackacre, Whiteacre and Greenacre and is entitled to a leasehold house on Brook Street. The will reads as follows: "I give Blackacre to A. I declare that my debts shall be a charge on the rest of my real estate. I give Whiteacre to B, and my house in Brook Street to C. I give $1,000 to D, all my books to E and the residue of my personalty to my cousins F and G in equal shares." G dies before the testator, and X is the sole surviving next of kin of the testator.

Order of application of assets for payment of debts, funeral and testamentary expenses

Class 1	general personal estate	F (share of residue of personal property), X (lapsed share of residue of personal property)
Class 3	land passing by intestacy	X (Greenacre)
Class 4	land charged with payment of debts	B (Whiteacre)
Class 5	general pecuniary legacies	D
Class 6	specific devises, residuary devises specific legacies	A, C, E

(Note: under common law order, a lapsed share of residuary personalty is not applicable before other shares of residuary personalty.)

Proposed order

Class (a)	property charged with payment of debts	B (Whiteacre), X (Greenacre)
Class (b)	residuary property, property passing by way of intestacy	F (share of residuary personalty, X (lapsed share of residuary personalty)
Class (c)	general gifts	D
Class (d)	specific gifts	A, C, E